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THE
OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XXI.

BEING REPORTS OF CASES DECIDED
BY THE
SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1919.

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NOV 20 1919

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Ohio Nisi Prius Reports

NEW SERIES—VOLUME XXI.

Causes Argued and Determined in the Superior, Common Pleas,
Probate and Insolvency Courts of Ohio.

PROCEEDINGS AGAINST RECEIVERS INCURRING AN UNAUTHORIZED INDEBTEDNESS.

Common Pleas Court of Hamilton County.

THE SHAWNEE LUMBER COMPANY V. PHINEAS S. PHILLIPS ET AL.*

Decided, October Term, 1917.

*Receivers—Continuation of the Business—New Indebtedness Incurred
in Excess of Authority—Form of Action for Recovery by Creditors
from the Receivers and their Bondsmen.*

Where receivers have incurred an indebtedness greatly in excess of the amount to which they were limited by order of court, the proper procedure by creditors holding claims so incurred without authority is by the filing of an intervening petition against said receivers and their bondsmen in the original action in which the receivers were appointed, rather than by the filing of an independent action.

*Jackson & Woodward and Bruce & Bruce, for the demurrer.
Charles W. Baker and Thorne Baker, contra.*

*Affirmed by Court of Appeals from bench, February 8, 1918.

GEOGHEGAN, J.

Heard on demurrer to the petition.

For the purposes of this demurrer the analysis of the allegations of the petition made by counsel for the plaintiff will be sufficient. That analysis is as follows:

That, in case No. 140650 of the Common Pleas Court of Hamilton County, Radina, Rodman and Phillips were appointed receivers of the Millcreek Wagon Company; that under the order of the court in the case the receivers were authorized to carry on and continue the business of the wagon company, but not to borrow money therefor to purchase and pay for necessary materials and supplies; that later, by various orders of court they were ordered to borrow specific amounts for specific purposes, and that under the authority apparently reposed in the receivers by the orders of court, plaintiff had sold the receivers goods and merchandise necessary to the business of the Millcreek Wagon Company, which did not exceed at any time the amount of \$2,000, as authorized by the respective orders of court; that since the plaintiff had so sold to the receivers it learned that the receivers had contracted an indebtedness vastly in excess of that authorized by the court, which the receivers have not been able to pay; that the receivers have sold all the property and assets of the Millcreek Wagon Company, and made final and complete distribution of the proceeds and filed their final account therein; that they were not able to pay and did not pay the large indebtedness set forth; that they did not pay their creditors an equal percentage of their claims, but paid some in full; that the purchases of the receivers exceeded the sums authorized to be borrowed by the court, and that such acts constitute a breach of duty, misconduct, etc.; that the amount of such indebtedness so wrongfully contracted is so large, and is distributed among so many creditors that the court is asked to ascertain who they are and how much is due them and to apportion equally the amounts due them; and the plaintiff bringing this suit for itself and for all, asks such amounts may be recovered from the receivers and their bondsmen as to make whole the creditors whose indebtednesses were wrongfully contracted as above set forth; that the

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bonds were in the usual form with the American Surety Company as surety and were for \$15,000 each, and that by reason of the conduct of the receivers as above set forth there has been a breach of the conditions of the bond for which the surety is liable. The prayer is that the plaintiff's claim for \$900 may be allowed against the receivers and their bondsmen, and that the plaintiff may be permitted to sue as a representative of all creditors who are similarly situated, and that plaintiff may have all other and general and equitable relief.

The demurrer is based upon three grounds: first, that there is another action pending between the same parties for the same cause; second, that there is a misjoinder of parties defendant; and third, that the petition does not state facts which show a cause of action.

It will be seen at the first blush that the relief sought for in this petition in so far as it affects the rights of the plaintiff and others similarly situated, against the receivers, is one which might be sought and had in the same action in which the receivers were appointed. The very case relied on by counsel for plaintiff to support his contention that he has a right to bring this action in the form in which it is brought, supports this view. That case is the case of *Haines v. Buckeye Wheel Co. et al*, 224 Fed., 289, decided by the U. S. Circuit Court of Appeals for this circuit, on July 20, 1915, wherein an intervening petition by the Buckeye Wheel Company against Haines, receiver, for the doing of such acts as are alleged to have been done by the receivers here, was upheld. But it will be observed that in that case the petition filed was an intervening petition and not an original petition in a separate action, as is the case here. It is true that in that case the court held, where a receiver purchased goods on credit without authority, the sellers could file a joint intervening petition in the receivership proceedings to require the receiver to pay into court the amount of their claims, notwithstanding they could maintain separate independent actions against the receiver and on his bond; but it will be observed that the court did not hold that the said joint petition could be filed and made the subject of a sepa-

rate action, but held (if it can be called a holding at all) that the fact that the sellers might maintain independent actions can not be considered a bar to their right to intervene by way of an intervening petition in the original action in which the receivers were appointed.

Now it is evident when the court speaks of independent actions, it means separate actions at common law against the receivers for money for goods sold and delivered, for which liability attaches on their bonds; and that is clear when one considers the authority upon which the court of appeals made this statement (*In re Erie Lumber Company*, 150 Fed., 817, an opinion by the District Court of the United States for the Southern District of Georgia), wherein in a bankruptcy proceeding the court, in passing upon debts contracted by certain receivers in bankruptcy beyond the amount authorized by the court, said as an *obiter dictum* that those persons to whom these debts were owing and for the payment of whose debts no funds remained in the hands of the court, by reason of the fact that all the funds accounted for by the receivers were applied to the payment of claims having priority, might have their remedy at law by separate actions against the receivers and their bondsmen by reason of the failure on the part of the receivers to faithfully perform and discharge their duties.

The court in this latter case certainly did not mean any more than this, that after all the receivership accounts were adjusted and it was found that there were persons who gave credit to the receivers in matters which were beyond the authority of the receivers under the orders of court, they might have their separate independent actions against the receivers for goods sold and delivered. But it is obvious that that sort of relief is not what is claimed here. This petition asks that this court in an action separate and distinct from the action in which the receiver was appointed, ascertain who are the creditors similarly situated with this plaintiff, what amounts are due them, what amounts over and above the amounts required to put all creditors on an equal basis have been paid to certain creditors by said receivers out of funds in their hands, and what amounts may be

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recoverable on account of said excess payments for the equal benefit of all said creditors.

This is asking this court to determine and settle the accounts of a receiver that was appointed in another action pending in this court. That this is not the proper way to proceed is shown by the language of the Supreme Court of Minnesota in the case of *State, ex rel, v. Germania Bank of St. Paul*, 103 Minn., 129, at page 143, which is as follows:

“It is elementary that the court appointing a receiver or assignee in insolvency proceedings has and retains exclusive jurisdiction over the proceedings and the receiver or assignee for all purposes, settling and adjusting, in the same proceeding, all connecting interests, all controversies, and all matters arising out of or connected with the trust, all questions respecting the accounts of the receiver, allowances for his compensation, the compensation of his attorneys, agents, and necessary clerks. No other tribunal has concurrent or other jurisdiction to order or interfere with the receiver in any way in the conduct of the office, or to settle or adjust its accounts. High, Rec., 48; 28 Am. & Eng. Enc. (2d Ed.), 1061; *Conkling v. Butler*, 4 Biss. (U. S.), 22 Fed. Cas. No. 3,100; *Smith, Rec.*, 593; *Beverly v. Brooke*, 4 Grat., 187.

“This exclusive authority and jurisdiction includes the surcharging of the receiver’s accounts for losses incurred through his mismanagement or negligence, and should in the orderly course of procedure be heard and determined in the receivership proceedings and by the court initiating and having jurisdiction of the same. Otherwise there would arise conflicts of authority between different tribunals assuming to act, and confusion in the adjudications affecting the rights and liabilities of interested parties would inevitably follow. Therefore the court first entertaining the proceeding by the appointment of a receiver must retain and continue its jurisdiction until the estate is finally closed by the settlement of the receiver’s final account and his discharge. The settlement of the account includes all objections made thereto by creditors, all questions of bad faith, negligence, and mismanagement by the receiver, and should be determined on the final hearing. *Minneapolis Trust Co. v. Menage*, 73 Minn., 441, 76 N. W., 195; *In re Angell*, 131 Mich., 345, 91 N. W., 611; *In re Cornell*, 110 N. Y., 351, 18 N. E., 142; *State v. Gibson*, 21 Ark., 140.”

Even if one were to admit that this proceeding might be maintained in this manner against the receivers, it certainly can not be maintained in this form against the bondsmen, the American Surety Company of New York. The surety company is liable only when it has been shown that there has been a breach of the condition of the bond, and it is liable to each person who has been damaged by that misconduct or non-performance of duty which constitutes a breach of the condition of the bond.

It is almost too plain to need exposition that this surety company can not be made a defendant in an equitable action to surcharge the accounts of receivers, where the relief prayed against the surety company is damages for breach of the conditions of the bond. It is evident from the face of this petition that there are a number of persons who gave credit to these receivers in matters that were beyond the authority of the receivers under the orders of the court. Each of these separate persons, after it is determined by a court, having jurisdiction in the matter, that the receivers are not entitled to charge the amounts so expended against the trust fund until all other creditors are paid, has a right to maintain an independent action for his claim against the receivers if any unpaid balance remains due him, and has a right to make the surety company a party defendant to that action and have a judgment against it in case he is successful. But, it is also true that the surety company has the right to make whatever defense it may have against any separate claim, and to insist on its strict legal right to have a jury determine whether or not under the particular circumstances of the case it is liable upon the bond as for a breach of its condition. Obviously then it can not be compelled to come into court and defend an action which simply seeks to have a court adjust and re-determine the accounts of receivers appointed in a different proceeding, because until that is done it can have no interest in the action.

Therefore, it seems to the court that this demurrer should be sustained for the reason that the relief here sought against the receivers should primarily be adjudicated in the action in which the receivers were appointed. Secondly, even if this pe-

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tition had been filed in the original action as an intervening petition for the purpose of readjusting and surcharging the accounts of the receivers, the surety company could be neither a proper nor a necessary party.

As to the question as to whether or not the petition states facts which constitute a cause of action, I am of the opinion that it does; that is, if it were filed as an intervening petition in the original action in which the receivers were appointed against the receivers alone, it would come within the rule laid down in *Haines v. Buckeye Wheel Company, supra*.

The demurrer will be sustained, therefore, on the grounds above noted.

INVALIDITY OF A WAIVER OF THE RIGHT OF HOMESTEAD EXEMPTION.

Court of Insolvency of Hamilton County.

IN RE ASSIGNMENT OF ADAM BECKENHAUPT.

Decided, April, 1918.

Homestead Exemption—Waiver of, by Executory Agreement Not Enforceable—Contrary to Public Policy Because of Protection Afforded to Family.

1. A debtor, in the absence of an express statutory provision authorizing him so to do, can not waive by executory agreement his right to homestead exemption in advance of the assertion of such right, and a waiver of such exemption, incorporated into a promissory note by the maker thereof, is against public policy and without effect.
2. An agreement incorporated in a promissory note to pay an attorney's fee in the event of non-payment of the note at maturity is also against public policy and void.

Edward J. Dempsey, for Beckenhaupt and wife.

J. T. Rhyno, for Mary A. Crone.

KELLEY, J.

This matter is before the court on the motion of Mrs. Carrie Beckenhaupt, wife of the assignor herein, for an allowance of \$500 in lieu of homestead exemption. The claim is resisted by Mary A. Crone in an intervening petition who asserts a right to the fund superior to the assignor and his wife by reason of an unsatisfied instrument in writing which reads as follows:

“\$500.00

CINCINNATI, OHIO, April 18, 1908.

“One day after date for value received we promise to pay to Mary A. Crone or order, the sum of five hundred dollars with interest thereon from date until paid at the rate of six per cent. per annum payable semi-annually with exchange at the current rate and with costs of collection and an attorney’s fee in case payment shall not be made at maturity. We hereby waive the benefit of all laws exempting real or personal property from levy and sale, or of any law intended for our advantage or protection. And we do hereby authorize any attorney at law to appear for us in an action on the above note at any time after said note becomes due in any court of record in or out of the state of Ohio, to waive the issuing and service of process against us and confess a judgment in favor of the legal holder of the above against us for the amount that may then be due thereon, with interest at the rate therein mentioned, and costs of suit, and to waive the right of appeal from the judgment rendered.

“(Signed):

ADAM BECKENHAUPT,

“CARRIE BECKENHAUPT.

“Interest paid in full until April, 1915.”

It is conceded that the agreement to pay an attorney’s fee in case of non-payment at maturity is against public policy and void in this state, but does not destroy the negotiable character of the note under Sections 8106 and 8107, General Code. *Miller v. Kyle*, 85 Ohio St., 186.

The stipulation of the waiver of the right of appeal in the event of a judgment rendered is likewise against public policy and void. *Myers v. Jenkins*, 63 Ohio St., 101, 103.

The only remaining question then is, in the absence of an express provision in the statute, can the right to a homestead, or to exemption in lieu of a homestead, be waived in advance by

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an executory agreement, such as is incorporated in the foregoing instrument?

There are many cases in Ohio affirming the doctrine of a waiver or relinquishment of a known right, or a statutory provision for one's benefit by express words or by conduct, but no case has been brought to the attention of the court where the precise, or a substantially similar question as here involved, has been judicially determined in this state.

One of the text writers, *Thompson, Homestead Exemptions*, Section 441, cites two Ohio cases, *Frost v. Shaw*, 3 Ohio St., 270, and *Butt v. Green*, 29 Ohio St., 667, in support of the text that a debtor can, in contracting a debt, waive his prospective right of exemption on the ground that such an exemption is a personal privilege which the debtor may waive at pleasure, but an examination of those cases does not seem to bear out the text. Both cases hold the debtor waived, not by an executory agreement to waive, but by neglect or omission in failing to select when the right thereto had accrued, and neither case can be held as an authority on the question here involved.

"The exemption of the homestead is not alone for the protection of the debtor, but its object is to protect his family from the inhumanity which would deprive its dependent members of a home, and in aid of this wise and humane policy, the act should receive as liberal a construction as can be fairly given to it." *Sears v. Hanks*, 14 Ohio St., 299; *Diehl v. Friester*, 37 Ohio St., 473.

Therefore, if the statutes of the state permit the homestead to be subjected to liability for debts, such liability can be acquired only in the manner provided by statute. *Butt v. Howell*, 50 Ia., 535; *McGuire v. Kennedy*, 91 Ia., 272.

The homestead can be alienated or conveyed in the manner provided by statute. It can be subjected to sale by mechanic's lien for purchase price, for taxes and the like, as provided in Section 11729, General Code, but in the absence of a statute, a prospective right of homestead can not be waived in advance by an executory agreement, such as is stipulated in the promissory note here involved.

It is true there are some states that hold to the contrary, but the overwhelming burden of authority is to the effect that it can not be thus waived. And this rests principally upon the ground that such an agreement is not a mere personal privilege or right of the debtor alone, but his family is equally interested in the subject of the agreement, and such agreement is therefore held to be against public policy and unenforcible.

The basic authorities supporting this principle are: *Curtis v. O'Brien*, 20 Ia., 376; *Kneetle v. Newcomb*, 22 N. Y., 249; *Carter v. Carter*, 20 Fla., 558; *Maloney v. Newton*, 85 Ind., 565.

There are many other later authorities all to the same effect, but perhaps the latest on the subject is found in 13 R. C. L., Section 117, p. 658. The author there states that:

"The courts generally, however, regard it as against public policy to sustain a waiver by an executory agreement of the right conferred upon a debtor, who is the head of a family, to claim as exempt, property which the law designs shall be exempt from levy or sale for the benefit in part of such family, and it is usually held that a homestead right when vested in the head of a family, can not be waived by contract in advance of the assertion of a homestead right. Especially is this true where such an agreement is not included within the modes provided by statute by which the homestead right may be extinguished."

Approving these views, it makes no difference whether the instrument or note is signed by both husband and wife, or whether they have or have not any minor children, and in the opinion of this court, the intervenor by virtue of her instrument has no rightful claim to the fund, and the claim of the assignor and his wife to the fund, in lieu of homestead, is accordingly allowed.

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Shawen v. Industrial Commission.

**TIME FOR APPEAL FROM REJECTION OF A CLAIM BY THE
INDUSTRIAL COMMISSION.**

Common Pleas Court of Montgomery County.

**WILLIAM H. SHAWEN v. THE INDUSTRIAL COMMISSION
OF OHIO.**

Decided, April 17, 1918.

Appeal—Under the Workmen's Compensation Act—Effect of the Continuing Jurisdiction of the Commission—Neither the Commission Nor Claimants Bound by Technical or Formal Rules.

Appeal to the common pleas court by an injured workman under the state compensation act is taken "within thirty days after the notice of the final action of the commission," if filed within thirty days after denial of a rehearing.

John J. Hoover, for plaintiff.*Harry N. Nolan*, Assistant Prosecutor, contra.

SNEDIKER, J.

In this case there has been made a motion to dismiss for the reason that the appeal was not filed within thirty days after the plaintiff received notice of the final action of the defendant denying him the right to participate in the fund.

The question presented by this motion and for our solution is as to the meaning and intent of the Legislature in that part of Section 1465-90 of the General Code (workmen's compensation law), which reads as follows:

"Provided, however, in case the *final action* of such commission denies the right of the claimant to participate at all, or to continue to participate in such fund, on the ground that the injury was self-inflicted, or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of claimant's right, then the claimant within thirty days after the notice of the final action of the commission, may by filing his appeal in the common pleas court of the

county wherein the injury was inflicted, be entitled to a trial in the ordinary way and be entitled to a jury if he demands it."

In the case at bar application was made for compensation, and was in December of 1916 denied by the commission on grounds going to the basis of the claimant's right. An application for a re-hearing was filed in January of 1917, and a re-hearing was denied in June of 1917. Upon the notice of the denial of the re-hearing plaintiff, within thirty days thereafter, filed his notice of appeal in the court of common pleas.

Was such notice of appeal a compliance with the section before referred to, or should it have been given within thirty days of the notice of the denial of the right, in December, 1916?

The fact that by Section 1465-86 the board is given "a continuing power and jurisdiction over each case," and the authority "from time to time to make such modification or change with respect to former findings or orders, with respect thereto as in its opinion may be justified," prevents all awards of the board from having the force, effect and finality of a judgment. In Ohio a judgment is defined to be a "final determination of the rights of the parties." No award is conclusive, either against the fund or against the claimant, while the foregoing authority, power and jurisdiction are vested in the commission. This being true, as to the question of the claimant's right to participate, the last action of the board is at any time the final action. If after denial a claimant's case is again brought to the attention of the board by motions for a rehearing and the board, as it did in the case at bar, by its action, denies once more the claimant's right to participate, on any of the grounds specified in the section (1465-90), then this last action of the board constitutes its final action, and the appeal may, in our judgment, be filed within thirty days from notice thereof.

This act is entitled "to a most liberal construction" as to appeals, for the reason that many of the claims are presented by claimants without the aid of a lawyer. Technically there is some reason for taking the view that appeals should be filed thirty days from the date of notice of the first denial on statu-

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tory grounds. This seems to be hinted at in the case of *Snyder v. Board of Awards*, 94 O. S., p. 342. But the act provides (Section 1465-91) that the board is not bound "by any technical and formal rules of procedure." And in our opinion the claimant should not be so bound, if he can be said fairly to be entitled to proceed along any particular line. If there is any question about the views heretofore expressed then there should be a requirement or rule of the board that the board, on the filing of a petition for a re-hearing, shall vacate its former order, renew such order or finding if the re-hearing is denied, or make another proper order, if allowed. In no event should a claimant be required or allowed to imperil his right of appeal in exercising his right to ask the board for a re-hearing.

The motion, therefore, to dismiss this case is hereby overruled, and the entry handed to the court by counsel in pursuance of the making of such motion sustaining the same, will not be approved.

PRESUMPTION AS TO A STREET ASSESSMENT.

Court of Insolvency of Hamilton County.

CATHERINE FUNKE ET AL V. CITY OF CINCINNATI.

Decided, May, 1918.

Assessments—For a Street Improvement Levied on the Benefit Plan—Presumption that it was Correctly Levied Arises, When—Discretion as to the Plan Adopted Not Open to Review—Benefit and Front Foot Plan of Assessment Can Not be Commingled.

A street assessment levied on the benefit plan will be presumed to have been correctly levied where the report of the estimating board was confirmed without exception; and abutting owners seeking a reduction of the assessment as to their lots on the ground that it should have been laid by the front foot plan will not be heard.

Fyffe Chambers, for plaintiffs.

Saul Zielonka, City Solicitor, and *Clifford Cordes*, Assistant City Solicitor, contra.

KELLEY, J.

The several parties plaintiff in this cause in substance complain that the defendant municipality attempted to make an assessment for the improvement of Exeter street under the benefit plan, but when the assessment was completed it was in fact a front foot assessment, and that because of that their property was assessed at the rate of \$4.01 per front foot when it should have been assessed at \$3.40 per front foot, and to that extent the assessments exceed the benefits. The answer of the city avers and in detail sets out the various steps they took, which it is alleged was in accordance with the statute in such cases made and provided, and that when the estimating board made their report fixing the proportion of the aggregate amount of the assessment upon each of the several lots plaintiffs made no objection thereto, and that thereupon the report was confirmed and the assessment levied accordingly.

The evidence disclosed that the improvement extended from McLean to Western avenue, one block; that sixteen lots fronting on both sides of Exeter street were the same width in rear as in front and aggregated 663 feet, and that these lots were assessed in amounts which would equal \$4.01 per front foot of each lot, and that five other lots, aggregating 242.79 feet, were assessed at various amounts. The rear of two of these lots abuts on the improvement and two on the side and one abuts on the improvement 75.46 feet front while its rear is only about 5 feet in width. The sixteen lots were of substantially the same value per front foot and were all equally benefited, while the irregularly shaped lots and those abutting on the rear were each of different value and each separately benefited.

The statutes authorize assessments to be made by three methods, viz.: 1st, by a percentage of the tax value; 2d, by the benefit plan; 3d, by the foot front (Section 3812, General Code). The authorities are uniform that whichever plan the municipality adopts, such discretion is not subject to a review by the courts. The authorities are equally uniform that when the municipality exercises its discretion under the statute and adopts one plan, it can not levy an assessment in part according to bene-

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fits and in part by the foot front, nor can one method be used under the guise of another method. And it is claimed that the effect of the assessments in this case violates the rules referred to, and that the entire assessment should be set aside, or, if not set aside, that it be corrected to the end that each foot of the plaintiffs' property herein be assessed \$3.40 instead of \$4.01, the former being the correct amount in the event that the foot front plan had been pursued.

If all the lots were of the same or substantially the same value and character, and of the same or substantially the same width in rear as in front, there would be merit in the contention, but it could not be said that a lot fronting 75.46 feet on the improvement that only had a width of 5 feet in the rear received the same benefits as if it was the same depth in rear as in front, like the sixteen lots referred to, nor could it be said that the lots of Catherine Wahoff and Catherine Hempelman, each fronting 35 feet on Western avenue and only a portion of their rear bounding on the improvement, could be benefited to the extent of any of the sixteen lots.

While the law of assessments exacts uniformity and that the burdens must be distributed equally, yet the Supreme Court of the United States, in *Norwood v. Baker*, 172 U. S., 269 (43 L. Ed., 443; 19 Sup. Ct., 187), says, "exact equality is not always attainable," and this is particularly applicable to a municipality like Cincinnati, where the topography of the ground is so varied and unequal. It was because of this and to meet such difficulties the Legislature of the state authorized municipalities in their discretion to adopt either one of three methods.

"It is a fundamental rule that an assessment, or tax for local benefits should be distributed among and imposed upon all equally standing in like relation." 5 McQuillan, Municipal Corporation, p. 4339; *Detroit v. Daley*, 68 Mich., 503.

Under the evidence in this case, the court is of the opinion that the sixteen lots heretofore referred to were in one class and stood in like relation and received the same benefits in proportion to each other, and that each of the other five lots abutting

and bounding on the improvement were each in a separate and distinct class to each other and also to the sixteen lots, and no one class received the same benefits as the other. In other words, there were six different classes of lots bounding and abutting on this improvement and to each class different benefits accrued. Had the foot front method of assessment been adopted and carried out and the assessment been made at a uniform rate per front foot on the several lots abutting on this improvement, each of the owners of the five irregularly shaped lots would have been entitled to relief from an assessment of that character.

An assessment will be presumed to have been apportioned according to law. *Anderson v. Bitzler*, 20 Ky. L. Rep., 1450.

The action of municipal authorities making an assessment comes within the general maxim that public officers are presumed to have rightly acted until the contrary is clearly made to appear. 5 *McQuillan, Municipal Corporation*, p. 4506.

Holding these views under the evidence and the authorities, the court is of the opinion the assessment as made should be sustained, the restraining order heretofore issued vacated, and the petition dismissed at plaintiffs' costs.

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Robbins, Admr., v. Rubber Co.

**LIABILITY FOR DEATH OF AN EMPLOYEE FROM BEING
FURNISHED CONTAMINATED DRINKING
WATER.**

Common Pleas Court of Clark County.

CLARA ROBBINS, ADMINISTRATRIX, v. THE VICTOR RUBBER
COMPANY.

Decided, May 13, 1918.

*Workmen's Compensation Act Affords no Protection to an Employer—
on Account of the Death of an Employee from Disease Contracted
in the Course of His Employment—Cause of the Disease the Em-
ployer's Negligence—Occupational and Non-Occupational Diseases.*

The workmen's compensation act was clearly intended to cover injuries or death from injuries as distinguished from disease; and a petition asking damages on account of the death of an employee of the defendant from typhoid fever, contracted from the drinking of contaminated water drawn from a well from which defendant's employees were supplied, is not open to demurrer, for the reason that the defendant is not protected by said act notwithstanding he may have paid into the state insurance fund.

Stafford & Arthur, for plaintiff.

J. M. Cole, contra.

GEIGER, J.

The plaintiff alleges that her decedent was employed by the Victor Rubber Company, a corporation, which it is conceded was an employer of five or more employees, and paid into the state insurance fund the amount required by statute.

It is alleged, briefly, that as appurtenant to its plant, the defendant had dug and maintained several wells from which water was pumped for utility and drinking purposes, and that the defendant had constructed certain toilets emptying into cess pools about 100 feet distant from the wells, and that they drained into the water wells, thereby contaminating the water used by the employees with typhoid fever germs, all of which was known, or should have been known to the defendant; that the decedent drank the water from time to time, and thereby

became infected with typhoid fever, and as a result of such infection died on the 10th day of January; that his death was caused by the infection from typhoid fever received into his system by drinking the contaminated water provided by the defendant, and that his death was without fault of the decedent but solely on account of the negligence of the defendant in the construction and maintenance of such dry wells near the drinking wells.

The plaintiff asks judgment in the sum of \$20,000.

To this petition the defendant demurs on the ground that the same fails to state facts sufficient to constitute a cause of action.

It is conceded in argument that the petition contains a cause of action, unless the defendant is protected by the workmen's compensation act.

It is claimed by the defendant that the death of the decedent from the accidental contact with the typhoid fever germs, through the negligence of his employee, is such an injury or death as is defined in the act providing for the maintenance and disbursement of the state insurance fund for the benefit of injured, and the dependents of killed employees, and that therefore this defendant is not liable under the provision of Section 1465-70, which provides that employers who comply with the provision of the preceding section shall not be liable to respond in damages at common law or by statute * * * for injury or death of any employee wherever occurring. * * *

Counsel for defendant cites in support of his contention, the case of *Vennen, Admr., v. Lumber Company*, decided October 26th, 1915, and reported in Vol. 161 Wis., page 370, where it is held that typhoid fever contracted by an employee, as the result of drinking polluted water, is a personal injury accidentally sustained, or approximately caused by accident within the meaning of the statute of Wisconsin.

It is maintained on behalf of the plaintiff that our own Supreme Court, in the case of *Industrial Commission v. Brown*, 92 O. S., 309, has decided adversely to the claim of the defendant.

It is there held that under the provisions of the original Workmen's Compensation Act, an injury or death, resulting from diseases contracted in the course of employment, known

as occupational diseases, are not such as are contemplated by the provisions of the act referred to, and can not be made the basis of a claim for compensation from the insurance fund so provided, and that although Section 35, Article II, of the Constitution, as amended September, 1912, authorizes the Legislature to pass laws providing an insurance fund to compensate workmen and their dependents for death, injuries or occupational diseases, occasioned in the course of employment, by compulsory contribution, the General Assembly has not yet provided by law for the compensation for injury or death from occupational diseases.

The court points out that the premium rates assessed and collected by the administration board during the period the voluntary act was in force, had been fixed on the basis of death and injuries by accident solely, to the entire exclusion of injury through disease, and the court says it is quite patent that any other construction would necessitate an immediate and striking horizontal elevation of all premium rates, and would in all probability be a serious menace to the law itself.

In speaking of the present act, upon the rendition of a decision affecting the former voluntary act, the court says:

“We note that the new act now in force, enacted by the Legislature after the constitutional authority had been granted, contains the same language in respect to beneficiaries of the act, as was employed in the original law, thereby clearly demonstrating an intention on the part of both of the assemblies speaking on the subject, to give the restricted, rather than the enlarged meaning to the phrase, ‘personal injuries.’”

The act itself, 103 O. L., 72, defines the powers, etc., for the administration of the fund for the benefit of “injured, and the dependents of the killed employees.” The present constitutional provision, so far as it relates to this matter, provides that for the purpose of providing compensation to workmen and their dependents, for death, injuries, or occupational diseases occasioned in the course of said workmen’s employment, laws may be passed, etc.

The court says it is to be observed that the constitutional amendment differentiates between injuries and occupational

diseases. It clearly recognizes three distinct classes for which provision may be made: (1) injuries resulting in death; (2) non-fatal injuries, and (3) occupational diseases, and all are to be limited to such as might be occasioned in the due course of employment.

It seems clear to this court, from a reading of the statute itself, and a consideration of the causes which lead to its adoption, and of the general discussion and common understanding of the act, as well as from a consideration of the constitutional amendment, that the act was clearly intended to cover injuries and death resulting therefrom, as distinguished from what is ordinarily considered a disease.

If the claim of counsel for defendant is correct it must follow from the decision of the court in *Industrial Commission v. Brown, supra*, that compensation may be given to workmen for sickness, and death resulting from non-occupational diseases, if the same were contracted either through the negligence of the defendant, or otherwise, in the ordinary course of employment, and that the workmen would be denied compensation for what are known as occupational diseases.

It is very generally understood that there has been no discussion contemplating the compensation of workmen for any disease other than occupational, and the Legislature has not yet extended the benefits of the act to those contracting an occupational disease. If death from a non-occupational disease brings the decedent within the favor of the statute, then sickness from a non-fatal, non-occupational disease would entitle him to partial compensation.

The words "injured and killed" as used in the caption of the act, and used in various sections throughout the act, contemplate personal injury, or killing through an outside violence accidentally applied.

To cover a disease such as has been set up in the petition, would be so to extend the scope of the act as to render its administration exceedingly difficult and burdensome, and would enlarge the scope over that contemplated by any friend of the act.

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The court is much more impressed by the reasoning in the dissenting opinion, in the case of *Vennen, Admr., v. Lumber Company, supra*, than by the opinion of the majority of the court.

The case of *Adams v. Acme Lead & Color Works*, 182 Mich., 157, commented upon by our Supreme Court, holds that the Michigan act does not apply to occupational diseases.

The court is further of the opinion that the matter is clearly decided, adversely to the claim of the defendant, by the Supreme Court of Ohio, in the case of *Industrial Commission v. Brown*, 92 O. S., 309.

Without further discussing this interesting question, the court is of the opinion that the demurrer should be overruled.

VALIDITY OF ASSESSMENT FOR MAINTENANCE OF CAMP MEETING GROUNDS.

Common Pleas Court of Hamilton County.

ALICE BRADLEY V. THE CINCINNATI CAMP MEETING ASSOCIATION.

Decided, July 6, 1918.

Charges and Assessments—May be Levied Upon Members of a Religious Corporation—Raising of Funds for Maintenance—Not Violative of the "Not for Profit" Feature or of Church Discipline.

An assessment levied by the trustees of a camp meeting association against cottage or lot owners, for the purpose of maintaining light and water systems, roads, walks and other necessary conveniences, and not for profit, is not *ultra vires* or in violation of the discipline of the Methodist Episcopal church, and an action lies for recovery of such an assessment.

Sanford Brown, for plaintiff in error.

Wm. R. Collins, contra.

NIPPERT, J.

The defendant in error, the Cincinnati Camp Meeting Association, is a corporation organized under the laws of the state

of Ohio as the Cincinnati Camp Meeting Association, of the Methodist Episcopal Church. The by-laws provide that the membership of the association shall consist, first, of all the lot owners, male and female, etc. Its constitution is based upon the charter of the organization, which provides in Article III that the purpose of said corporation is not for profit, but to provide succession to a board of trustees and for the support and maintenance perpetually of religious camp meetings, in strict accordance with the policy, established usage and discipline of the Methodist Episcopal Church, so that the members and friends of said church may assemble once annually, or oftener, if desired, for religious worship, and to hold sacredly in trust forever for the Methodist Episcopal Church the money, property and values of every kind heretofore donated, contributed, collected and held for camp-meeting purposes, * * * and the furnishing of convenient and desirable tents, cottages and summer homes, roads, walks, light and water and all other necessities, conveniences and accommodations upon the camp-grounds of the association at Loveland, Ohio, for members and friends of the Methodist Episcopal Church who may regularly or from time to time attend said camp meetings for religious worship, and desire such accommodations and camp meeting homes.

The board of trustees of the defendant corporation claim that under the authority granted in the charter, as well as by virtue of the constitution, which is based upon the provisions of the charter, they are authorized to levy upon all cottage owners or land owners a certain charge as dues or assessments for the purpose of maintaining the roads, walks, light, water and other necessities, conveniences and accommodations, and for this purpose the said board of trustees by a formal act of November 18, 1915, passed a resolution to the effect that the dues of the cottage owners on the property of the Cincinnati Camp Meeting Association at Epworth Heights be \$15 per year for each cottage, said amount to be payable the first of the year.

Upon attempting to carry this order into effect, plaintiff in error, Mrs. Alice Bradley, the owner of two cottages, raised a serious objection and refused to pay, claiming, among other

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things, that the act of the board of trustees was without warrant in law and *ultra vires*, and that since the organization of the defendant corporation, in 1874, no attempt had been made, prior to November 18, 1915, to assess any property owners or collect any assessments or dues of any kind from the cottage owners, but that the association, up to the time of the occurrences herein stated, had been supported entirely by voluntary contributions. Plaintiff in error further maintains that the Cincinnati Camp Meeting Association, being a religious corporation not for profit, an assessment against the members can not be made since under the discipline of the Methodist Episcopal Church no assessment can be made upon the members of said church.

Alice Bradley failing to comply with the resolution of the board of trustees of November 18, 1915, was made defendant in a proceeding brought by the Cincinnati Camp Meeting Association, in the municipal court, and judgment was rendered against her in the sum of \$61 and costs, to all of which the defendant below excepted, and the case is now before this court on the petition in error.

There is very little dispute as to the facts in the case, and the only question remaining to be decided is that pertaining to the authority of the trustees to levy an assessment upon the cottage owners, their authority being questioned both under the laws of the state of Ohio and the discipline of the Methodist Episcopal Church.

After carefully examining the record and the exhibits, we find that Alice Bradley holds her title under a certain deed, in which the following appears:

“The grantor, in consideration of one hundred and fifty (\$150) dollars and other valuable considerations in hand paid by Alice M. Bradley, does hereby grant, bargain, sell and convey to the said Alice M. Bradley, her heirs and assigns forever, the following described real estate, situate at Epworth Heights, near Loveland, in the county of Clermont and state of Ohio, the following described property, the lot known on the plat of the grounds of the Cincinnati Camp Meeting Association of the Methodist Episcopal Church, incorporated under the laws of Ohio, as Lot No. 27, being — feet in front by — feet in depth,

together with the building thereon in said association's camp ground near Loveland, Clermont county, Ohio, in fee simple, for camp-meeting association purposes, and to be used only in accordance to the constitution, by-laws, rules and regulations of the said Cincinnati Camp Meeting Association of the Methodist Episcopal Church and the discipline of the Methodist Episcopal Church as the same now exists and may hereafter be lawfully made, and to be used in no other way and for no other purpose."

It appears from this deed that Alice Bradley took any real estate of which she is now seized, located at Epworth Heights camp-meeting grounds subject to the conditions, limitations and qualifications set out in her deed.

In the case of *Davis, Auditor, v. Cincinnati Camp Meeting Association*, reported in 57 Ohio St., 257, an attempt was made by the auditor of Clermont county to levy taxes upon the tabernacle and properties owned and used by the said camp meeting association, and the court held that the camp meeting association is exempt from taxation under the sixth clause of Section 2732, Revised Statutes (Section 5349, General Code), and

"that none of said real estate is leased by plaintiff, nor is any of said real estate in any manner used with a view of profit. * * * *And though charges are made for the use of certain privileges*, these are not inconsistent with the finding, that none of its property is leased or used with a view to profit. None of its lands, as shown by the finding, are used for any other purpose than to provide for the convenience and comfort of those who may attend the meeting; and these (charges) are not sufficient to meet the expenses of the association, and have to be met in part by donations from those interested in the maintenance of the meeting. So that the charges are not then made with a view to profit."

This court is of opinion that the charges made by the trustees are based upon the resolution of November 18, 1915, and that they are made merely for the purpose of maintenance and up-keep of roads, walks, light, water and all other necessities, conveniences and accommodations upon the said camp meeting grounds *and not made with a view to profit*, and are therefore not *ultra vires* but come within the purview of the charter and constitution of the defendant company, and further, are not

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limited by any of the provisions of the discipline of the Methodist Episcopal Church. The section of the discipline referred to by counsel for plaintiff in error does not mean that ecclesiastical institutions authorized and carried on under the auspices of the Methodist Episcopal Church may not, under certain conditions, if authorized by their charter, make certain charges. There are being conducted under the auspices of the Methodist Episcopal Church today numerous colleges, hospitals, orphanages, old people's homes and camp meeting grounds in different parts of this state and throughout the Union, whose trustees make charges for the accommodations and conveniences furnished to the users, attendants or inmates, *but not made with a view to profit*, which have been held to be perfectly legitimate and within the powers of the respective boards of trustees making these charges.

The board of trustees of the Cincinnati Camp Meeting Association would not be discharging their trust in accordance with the spirit of the charter and the constitution if it did not maintain those necessary conveniences of life which present-day progress has deemed absolutely essential to the health and welfare of civilized communities. The fact that up to within a few years ago much of these necessary expenditures in connection with the grounds of the association were met by voluntary contributions of the sisters of the church, does not preclude the board of trustees from gathering the necessary sums in the manner suggested, for if the water supply and the lighting system and the condition of the roads were dependent upon voluntary contributions the institution known as the Cincinnati Camp Meeting Association at Epworth Heights might soon fall into decay.

While the state of Ohio may not tax the property of the Cincinnati Camp Meeting Association, exclusively used for camp meeting purposes and with no view to profit, the trustees of the camp meeting association may, under the charter and constitution, levy a reasonable assessment or annual charge against the cottage owners and lot owners for general maintenance purposes for the benefit of the whole.

It is therefore the opinion of this court that judgment of the court below be affirmed.

**INADEQUATE SETTLEMENT WITH CONTRACTOR FOR INJURIES
NOT A BAR TO ACTION AGAINST THE CITY.**

Common Pleas Court of Cuyahoga County.

FRANK SEMERARO V. CITY OF CLEVELAND.

Decided, January Term, 1918.

Settlement—Not a Bar to Action Against Another, Guilty of Concurrent Negligence, When—City Liable for Further Damages for Injury on a Defective Walk—Where Insufficient Payment Has Been Made by Negligent Contractor—Joint and Concurrent Torts Distinguished.

1. An insufficient settlement by a negligent contractor for an injury suffered on a defective sidewalk can not be interposed as a bar to further recovery from the city on account of the same accident, and a court will not disturb a verdict assessing further damages against the city where it appears that the plaintiff will still be inadequately compensated for the injury sustained.
2. In the case of such an accident the city and the contractor are not joint tort feorsors, and their concurrent acts of negligence, the one of commission and the other of omission, do not permit of their being joined either with or without the abutter in the same action.

Jacob DeKaiser, for plaintiff.

J. T. Cassidy, contra.

LEVINE, J.

Opinion on motion for new trial.

This is an action in which the plaintiff in his petition claims damages against the city for failure on its part to perform its statutory duty to keep its streets in repair and free from nuisance. He alleges that he was injured March 6, 1916, by reason of his foot catching in a defective and unsafe portion of the sidewalk on Ivanhoe road in said city whereby he was precipitated violently to the ground and seriously injured.

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The city filed an amended answer in which it not only denied all negligence on its part, but set up, as a second defense, an alleged written contract of settlement with the Bailey Company whereby, in consideration of the sum of \$600, the plaintiff consented to the settlement of an action in which he was plaintiff against the Bailey Company, pending in the common pleas court and containing identical allegations of negligence and injuries set forth in the petition in this case and covenanting to abstain from prosecuting said the Bailey Company in any court for the purpose of recovering damages from it for any injuries received by him March 6, 1916, on Ivanhoe road, Cleveland. The city further alleges that said sum of \$600 was substantial, full, complete and adequate compensation for all injuries received by him and a bar to any claim against the city.

A copy of said alleged contract of settlement is attached to the amended answer and by reply thereto it is admitted that said paper writing was entered into by the plaintiff and the Bailey Company, but it is denied that the same or the \$600 received as stated therein was in full settlement for plaintiff's said injuries, and it is claimed that it is a mere covenant not to sue the Bailey Company and not a bar to this action against the city.

The contract in question reads as follows:

“COVENANT NOT TO SUE.

“For and in consideration of the sum of six hundred and 00/100 dollars (\$600.) to me in hand paid by the Bailey Company, receipt of which is hereby acknowledged, I, Frank Semeraro, on behalf of myself, my heirs, administrators, executors and assigns hereby consent to the dismissal of an action now pending in the court of common pleas, Cuyahoga county, Ohio, of which I am the plaintiff and of which the Bailey Company is the defendant and which case bears No. 152467. I further covenant and agree with the said the Bailey Company to abstain from prosecuting any action against the said the Bailey Company in any of the courts of the state of Ohio or the United States or elsewhere, for the purpose of recovering damages for any injuries or injurious results direct or indirect which may have been or may hereafter be sustained by me resulting from, or in any manner growing out of an accident which occurred on

or about the 6th day of March, 1916, in front of 1015 Ivanhoe road, Cleveland, Ohio, in which accident I fell on the sidewalk and broke my right leg."

This case was submitted to a jury on the above mentioned pleadings and the evidence, resulting in a verdict for the plaintiff, and now, on the motion for a new trial filed by the city, the only material question raised is the proper construction to be given said contract with the Bailey Company, which the court instructed the jury was no bar to plaintiff's action against the city.

There is no question that the release of one joint tortfeasor is a release of all, and satisfaction as to one operates as satisfaction as against the others, even though the contrary be expressly stipulated. This was so held in the case of *Ellis v. Bitzer*, 2 Ohio, 89, and has been the law of Ohio ever since. Indeed, this case is the leading case on the subject in the United States.

The extent to which this doctrine is carried in Ohio is shown by the case of *Klages v. Kronenbitter*, 25 C.C.(N.S.), 191, where an answer set up a covenant not to sue a third person similar to the covenant in this case, and also alleged that the sum paid by the third person "was a full, complete and adequate compensation for all injuries received by said plaintiff as he well knew at the time he received the same." A demurrer to this answer was overruled, rightly, as the court of appeals held, because having received from one "the full amount of his injuries," he could not recover against others who were alleged to have contributed to his injuries.

While similar allegations are made in the amended answer in this case—that the \$600 received from the Bailey Company was in full settlement for plaintiff's injuries—that fact was put in issue by the reply, no evidence was introduced to substantiate it, and the jury has found with the plaintiff, and the evidence warrants its finding, that \$600 was not full compensation for the plaintiff's injuries and was not intended as such, either by the plaintiff or the Bailey Company.

It is stated in 34 Cyc., 1090, that a covenant not to sue—which is what we have here—never operates as a release, but

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whatever consideration is received for the agreement must be applied to the payment *pro tanto* of the recovery, and that even the covenantee can not plead it as defense but must seek his remedy in an action on the covenant.

The cases cited fully sustain the text, and the Ohio cases are not at variance with the rules thus stated.

The case of *Ellis v. Bitzer*, *supra*, is in full accord with the above principles. In that case one of the questions was: "Was the note mentioned in the plea executed and received in *satisfaction* of the trespass complained of in the declaration?"

As to this question the court says that it is "purely a question of fact and depends upon the testimony" (p. 91). Then examining the facts, the court finds that the note in question was received in satisfaction of the trespass complained of and the makers of the note discharged "from *all further* liability on account of their being jointly concerned with the defendants in the trespass."

So here, the question of *satisfaction* was properly submitted to the jury. Had it found that \$600 was the full measure of plaintiff's injuries, then, having received that amount from the Bailey Company, he would not receive more from the city. Having, however, found, as the evidence warranted, that Frank Semeraro would be very inadequately compensated for his broken leg permanently shortened, by the pittance of \$600, it brought in a verdict in the sum of \$1,900 against the city, and the court can not say that \$2,500 is excessive compensation for the plaintiff's injuries.

There is another proposition in this case which militates against the city's right to maintain its second defense, and that is that the city and the Bailey Company were not *joint* tortfeasors. The Bailey Company, if negligent at all, was guilty of commission, with respect to the sidewalk in front of its premises on Ivanhoe road; it did something negligently which caused an obstruction in the sidewalk upon which Semeraro tripped—at least, from such an act alone could its liability to plaintiff arise.

On the other hand, the liability of the city arises from an act of omission—it failed in its duty to keep the sidewalk in repair

and free from nuisance. These would be at best only concurrent acts and not joint torts, and the city and the abutter could not be joined and sued in an action as joint tort feorsors. *Morris v. Woodburn*, 57 O. S., 330; *Village of Girard v. Gilbow*, 81 O. S., 263. Hence a release of one would not release the other, and I so hold.

The motion for a new trial is overruled.

**COUNTY COMMISSIONERS WITHOUT AUTHORITY TO REVIEW
ACTION OF TAXING OFFICIALS.**

Common Pleas Court of Huron County.

IN RE APPLICATION OF GEO. W. HOLZ FOR A TAX REFUNDER.

Decided, October 27, 1917.

Taxation—Application for a Refunder of Taxes—Rejection of, by County Commissioners—Appeal to the Common Pleas Dismissed for Want of Jurisdiction.

A board of county commissioners has no authority to review the action of taxing officials, and where an application has been made to the commissioners for a refunder of taxes levied on property which had been given an excessive valuation they are without jurisdiction to act, and appeal does not lie to the common pleas court from action taken by such board on such an application.

A. M. Beattie, for plaintiff.

Frank Carpenter, Prosecuting Attorney, contra.

YOUNG, J.

This matter comes before the court upon the motion to dismiss the appeal attempted to be perfected in this case—an appeal by Mr. George W. Holz to the decision of the county commissioners rejecting his claim for a refunder of certain alleged taxes.

The sole mistake, if any there was, was made by the assessing body in making or placing too large a valuation upon the property of Mr. Holz. The body thus making the mistake of

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over-valuation, if any such there was, is the body charged in the first instance with fixing said valuation. The most that can be said about it, as it is characterized as having been unjust and erroneous, is that it was an erroneous exercise of judgment. That is to say, the persons charged with fixing the valuation and determining it, in the exercise of that judgment they were bound to render, did not justly value but over-valued the property. There is no mistake in fact, underlying their action.

It is, perhaps, like the judgment of the court. When a court hears and determines a matter, its decision may be erroneous, but is the one that the court intended to make and did in fact, make, and made it upon what the court determined was the evidence submitted. It can not be said that the court, however erroneous its judgment, was mistaken in its judgment. It may be reversible because it is against the weight of the evidence, or because improper evidence was permitted to be given, but, after all, the court intended to do the very thing it did do, and it is not a mistake, such as this statute contemplates.

The auditor is charged with making up the duplicates from the returns of the taxing officer. Unless the first or primary taxing official has made a mistake, and his action has been corrected by those the law appoints for that purpose, it is made up from reports from the original assessor. If that action has been reviewed, as the law says it may be, by certain officials, then the duplicate shows the corrected matter; that is to say, what the reviewing board has done, based upon its finding concerning the original assessment. And, in any event, it is the final result as the auditor finds these bodies determine, that the auditor is required to carry into the duplicate.

Just like the recording by the clerk of the court of the action of the court itself. If he has properly kept and carried into the journals what the court has actually decided, however erroneous the court's judgment may be, it is not a mistake of the court nor a mistake in the journal, but is a correct recital of what was actually done.

There is no difference between the parties concerning the facts as to what was done in this case, so far as appears. The auditor recorded in the duplicate exactly what these taxing offi-

ciala did; and there is no allegation to the contrary and no finding that it wasn't so. It is true that the auditor is authorized to correct mistakes in the duplicate, if he discovers them, and that, after the duplicate has passed beyond his control, he may, by giving information to the county commissioners, authorize such board to correct any mistake that has crept into the duplicate. I am not saying but that the auditor would have the right to correct a mistake without calling the attention of the commissioners to it where it is manifest from the duplicate itself. I rather think that the commissioners, no matter how they discovered such a mistake, might have the power to act, under the authority of Section 2589, General Code, to order the correcting of a mistake of that character.

But this is not such a mistake as that; and it has not been shown to the court that other than mistakes of that character that are discoverable upon the duplicate can be corrected by the commissioners. In other words, there is no statute that the court's attention has been called to making the commissioners a court of appeals to review the action of the taxing officials. Other bodies have that power, and not the commissioners.

Therefore, the court is of the opinion that the motion, or the request or action, that was asked of the commissioners was beyond the powers of the commissioners to grant. The board had no jurisdiction, in other words, and that being the case, there can be no appeal sustained from the board's action; and the court can not entertain the appeal, but will dismiss the same, and grant the motion.

Of course, having no jurisdiction before the commissioners, there is no jurisdiction here; and each party will probably have to pay their own costs, for there being no jurisdiction, the court can not assess costs on either one. The costs will have to be paid by the party making them.

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**FAILURE OF THE EVIDENCE TO SHOW THE CAUSE OF
THE INJURY COMPLAINED OF.**

Superior Court of Cincinnati.

OLIVE A. McLAUGHLIN v. THE P., C., C. & ST. L. RAILWAY CO.*

Decided, May 16, 1917.

[Statement by Judge Pugh to the jury at the close of defendant's case and of all the evidence, when he directed a verdict in favor of defendant.]

Directed Verdict for Defendant—Justified Where None of the Circumstances Favor, But All are Opposed, to the Theory of the Cause of the Injury Advanced by the Plaintiff.

In an action for an injury received by a passenger in a railway car, alleged to have been caused by a piece of metal thrown off by the explosion of a torpedo on the parallel track, the absence of evidence of any occasion for the use of a torpedo by the railway company at that time and place, together with the fact that the torpedoes used by the company were of the paper variety from the use of which no injury could occur, and the further fact that even had a torpedo made in part of metal been exploded by a train on the parallel track it would have been physically impossible for any of the pieces to have reached plaintiff, affords sufficient ground for directing the jury to return a verdict for the defendant company.

I have finally arrived at the conclusion after considering this matter last night, that this case should have been withdrawn from the jury at the end of plaintiff's testimony, as requested by the defendant. In my judgment it is not a case in which plaintiff

*Affirmed by the Court of Appeals in the following memorandum opinion:

"BY THE COURT—

"The record fails to disclose that any evidence whatever was offered tending to show negligence on the part of the defendant. The court was therefore justified in granting defendant's motion for a directed verdict in its favor."

iff can possibly be entitled to recover any damages at all, and I am going to point out one or two of the reasons why I think that is so, and to endeavor to make it plain to you.

You will remember there were only two witnesses of the plaintiff who testified as to the happening of the accident; one was the plaintiff herself, Mrs. McLaughlin, and the other one was a Mrs. Lawrence. You remember she was the singer who lived in Louisiana, and they read her deposition here. There was no other living person who testified to the happening of the accident, except this plaintiff and this other witness.

When a suit is brought and money is attempted to be recovered by a jury, the law requires that the person seeking to recover damages that way shall state clearly what it is that he or she complains about, and he has to state that in this paper that we call the petition, part of which was read to you in this case.

Now the plaintiff's case is that she was injured by the explosion of a torpedo on the track adjoining the one on which she was riding, and that torpedo was a torpedo being used by the defendant company or one of its employees in the course of its business, and that the explosion of the torpedo resulted in throwing particles of it some distance and to a height of ten or twelve feet, and that some particles on that torpedo came through the open window of the car in which she was riding, on the evening of the 2d day of May, 1912, and inflicted injuries from which to this day she claims she is still suffering.

What is there to show that any torpedo was used at all? Both these women say they heard an explosion. One of them said she heard something, evidently a missile, or particles of a missile, rebound on the glass pane. The other lady did not see anything of the missile, but she was injured, evidently by something that came in through the window by which she was seated.

What do we know about torpedoes? Remember, we must decide a case according to what we hear from the witness stand; we can not go beyond the witnesses' testimony, we are bound by

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that, and we must be guided by the evidence and the law and nothing else; whether we like that way of doing or not, that is the law.

Let us look at this diagram. (Referring to drawing on black-board.) If this was a torpedo, as this lady claims, look what must have happened. The far track, the upper one toward the north there, the one that goes to Cincinnati, that is the one they have been calling the west track, and the one on the lower side is the east track; that is the one the train was on on which this lady was riding. She was in the coach on that track, on the left hand side of it, you remember, and she says she was struck on the left elbow, with the window open. Now, we are invited to believe that there was a torpedo on the west track, and that torpedo was exploded by the train that came down on that track, and threw the particles into the window. You must remember that when torpedoes are used at all, they are put on the rail on the engineer's side. Which is the engineer's side on the diagram? The engineer's side is the rail nearest the top; so, if a torpedo was exploded by that train coming down on the west track, and the fragments blew into the window and struck this plaintiff, these fragments would have to be thrown through the body of the engine that exploded it. Just stop and consider it. It was on the upper track; it must have gone bodily through the engine and crossed the intervening space between the two tracks and into that window. That is one thing that is the trouble with the plaintiff's case in this instance.

This testimony is undisputed. There is no quarrel about this. We all agree that the torpedo is put on the engineer's side when it is put there by the railroad company or its employees. If anybody else put it there the railroad company is not responsible.

Torpedoes are used for calling attention of the engineer to a train that is expected. Torpedoes are put upon the track so that they will explode when the engine wheel runs over them, and notify the engineer to stop his engine there; that there

is some train, or obstruction on the track, or some workmen repairing the track, or that the train is delayed, or when something unusual occurs.

Now we have all ridden on trains a good many times, and you know you don't as a rule hear torpedoes; once in a while you do.

Was there anything here to show there was any emergency that called for the use of a torpedo? Both these trains were practically on time; there was nothing within half an hour of either one following them on the track. What is there to show that a torpedo would be used under those circumstances? Nothing at all. If a torpedo was exploded by a train on the west track, the torpedo was simply put there for the fun of it, it was simply thrown away, because it was not notice to anybody that there was anything on the west track, the track on which it is alleged the torpedo was exploded. It is not shown that there was any use for the torpedo even if we had testimony that there was a torpedo.

Then take the next thing. The only evidence that there was any kind of a torpedo used by the railroad company in 1912, is that they used these paper torpedoes. There is evidence that paper torpedoes do not cast off particles, they do not fly, or if they fly they fly a little distance and are like small feathers; one witness said that when he stood along the track, two or three feet away the paper might strike his trousers, but for a torpedo to explode so that the particles of it would fly twenty or eighteen feet and produce an injury on a woman's arm that would last from 1912 to 1917, is calling for a large stretch of imagination at the best.

There is evidence that there was an explosion of some kind. One witness said it sounded like a shotgun. There is no evidence that that explosion was on the track that the engine No. 219 was running on. There is testimony that something came in at the window; there is no testimony anywhere to indicate that it came from a torpedo, except that a train ran down on the other track. Under the circumstances, even if there had

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been a torpedo, it could not come in the window without passing through the engine, and if it had come in it would have been nothing but a piece of paper.

I think that is enough to dispose of this case, so the direction of the court is that the jury bring in a verdict for the defendant.

[It will be noted that the opinion which follows is in the same case as the preceding opinion by Judge Pugh. It was rendered at the first trial of the case. At the second trial the jury disagreed, and at the third trial was terminated in the manner indicated above.]

**A RULE WHICH SOMETIMES PREVENTS SIMPLE
AND DIRECT PROCEDURE.**

Superior Court of Cincinnati.

OLIVE A. McLAUGHLIN v. THE P., C., C. & ST. L. RAILWAY CO.

Decided, November, 1916.

Res Ipsa Loquitur—Not Applicable Where the Injury Complained of Was Not the Probable Consequence Nor One Reasonably to be Anticipated from the Cause Assigned—Mistaken Refusal by Trial Judge to Grant Motion to Direct Verdict for the Defendant—Can Not be Cured by Subsequently Granting a Motion for Judgment Non Obstante Verdicto—Justice Delayed Under the Ohio Rule.

The Ohio rule which denies to a trial judge authority to grant a motion for judgment *non obstante verdicto* unless based on the pleadings, where he has become satisfied that error was committed in overruling the motion for a directed verdict for the defendant, works hardship and necessitates useless labor and expense, where a case is found to be without merit and should be immediately terminated.

Maxwell & Ramsey and *Robert A. Taft*, for the motions.

Thomas L. Michie and *Fulford, Shook, Wilby & Fricke*,
contra.

MERRELL, J.

Ruling on motion for new trial and for judgment *non obstante*.

The plaintiff was a passenger on defendant's train from Cincinnati to London, Ohio. She sat by an open window on the left-hand side of the car, which was north bound, and therefore next to the south bound track of defendant's road. She claims that at a certain point in the journey an engine on the south bound track exploded a torpedo immediately opposite the window by which she was seated, and that she was struck upon the arm in two places near the elbow by particles from the exploded torpedo and was deafened by the explosion. To indicate that the torpedo was exploded at this point, there is the plaintiff's own testimony and that of a woman passenger sitting behind her, who heard particles rattling against the car window, and the testimony also of the train conductor, who was not in the plaintiff's car at the time, but from the next car heard a sound which may have been that of a torpedo. The plaintiff made an outcry and another passenger in her car bound up a red spot which he saw upon her arm. A physician acting for the railroad company examined the plaintiff's arm at the next station, and a day or two after plaintiff arrived at her destination she called upon a physician in private practice who suggested that the arm be bound up. Neither of these physicians was called at the trial by the plaintiff, and the only physician who testified in her behalf was one who first examined her in 1915, three years after the accident, which occurred in 1912. This physician testified that he found trouble with the funny bone which might have resulted from a bruise, and was probably due to a pressure on the nerve. The plaintiff, called upon to describe her position, said that she sat in the middle of the car seat, reading, with her elbow in a position that must have been below the level of the window sill. She wore a thin waist which she does not recall as having

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been cut or burnt. The waist itself was not preserved for examination at the trial.

As part of the plaintiff's case, there was testimony by a person who had an opportunity to make repeated observations of the explosion of railroad torpedoes, and of the distance and course of flight of particles after explosion. This testimony hardly suffices to show the possibility of a particle from a torpedo travelling the distance and course supposed to have been taken in the present instance. Under the circumstances of this case, a torpedo exploded on the rail nearest to the plaintiff would have had to travel approximately twenty feet, to have reached a height of something over six feet, to pass over the window sill of plaintiff's car, and then descend somewhat in order to strike against plaintiff's elbow in the position she occupied.

Notwithstanding this aspect of the plaintiff's case the motion to direct a verdict was overruled, the court being somewhat influenced by the idea that in the relation of carrier and passenger the doctrine of *res ipsa loquitur* might apply.

From the defendant's case, it would appear that immediately after the plaintiff's outcry careful search was made of that portion of the car in which the plaintiff sat, without finding a particle from the torpedo or anything that would tend to explain her hurt. The railroad physician who made a cursory examination of the plaintiff perhaps an hour after the injury, testified that he could not observe any bruise or swelling upon the arm and found no difference between the plaintiff's injured and uninjured arm, even upon comparison with a steel tape measure. The physician unconnected with the defendant company upon whom the plaintiff called a day or two after the accident, testified that he saw no evidence of external injury to the arm, no red mark, and no swelling. He examined the arm for tenderness, and found the entire arm tender, especially sensitive about the shoulder.

The defendant company, claiming that there was no torpedo explosion at the point in question, called the telegraph operator

stationed at the place, and the section foreman who was at work nearby and within sight and hearing, neither of whom knew of any torpedo or heard any explosion; presented also testimony indicating that the train which passed the car in which plaintiff was riding reached its next stop within a time which it could not have accomplished if it had been flagged by a torpedo explosion. The defendant also presented the testimony of witnesses having a wide observation of the action of railroad torpedoes, to the effect that a particle of an exploded torpedo had never been known to carry the course and distance necessary to accomplish plaintiff's injury, and to explain the actual effect of a torpedo explosion and the known possibilities of particles flying. By other evidence the defendant established the fact that for a period dating back several years before plaintiff's injury, it had abandoned the use of tin torpedoes, with the effect and operation of which alone the evidence in the plaintiff's case had concerned itself, and had adopted the use of paper torpedoes.

The construction of paper torpedoes and the possible effects of their explosion were fully detailed by one expert in their manufacture, having a wide experience as to their consequences through repeated tests. The testimony of this witness was to the effect that the paper covering of such torpedoes is turned by their explosion into what he called "feathers," which carried one or two feet away from the point of explosion, and that the torpedoes are absolutely non-flying. The same witness testified that particles of tin torpedoes do not rise more than two or three feet, and that in case of both varieties the explosion was downward, and necessarily so because the torpedo is crushed under the engine wheel, which extends or overhangs beyond the top surface of the rail. On the foregoing testimony the jury returned a verdict in a substantial sum for the plaintiff.

The defendant now moves for a new trial and also for a judgment in its favor notwithstanding the verdict. Upon the evidence thus outlined, I am entirely clear that the verdict was against the manifest weight of the evidence. I am further convinced that the error in the result thus far reached is much more fundamental.

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The case was given to the jury on what I now feel to be a misconception of the scope of the doctrine of *res ipsa loquitur*. This doctrine, which has its commonest application in cases arising between passenger and carrier, is not a rigid formula. A passenger receiving an injury from a cause apparently within the control of the carrier, may frequently invoke the doctrine as a substitute for specific proof of acts or omissions constituting negligence. In order, however, for the doctrine to have any application, the injury must be one caused by an instrumentality in the control of the carrier, in such wise that the ordinary mind will naturally and reasonably infer negligence on the part of the carrier, and infer also the causation of the injury by reason of such negligence. The doctrine is one which substitutes a natural inference for legal proof.

Under the supposed facts of the present case, it may be doubted whether the injury claimed under the circumstances of its occurrence naturally suggests the inference of negligence on the part of the railroad in the use of signal torpedoes. Even if such inference does arise, its force is totally lost when, upon the evidence, it appears that the injury claimed was not the probable consequence, nor one reasonably to be anticipated from the explosion of a signal torpedo at such a distance.

Moreover, presumption or no presumption, the burden of proof rested upon the plaintiff in this case to establish negligence on the part of the defendant, and to establish further that such negligence was the proximate cause of the injury claimed. It is in the latter essential proof that the present plaintiff has totally failed. This failure was fatal to her case, even if it had been established beyond peradventure of a doubt that she was actually struck by a flying particle of a torpedo and permanently injured. This was the ruling of the court of appeals of this district in *Dunham v. B. & O. S. W. R. R. Co.*, 2 Ohio App., 326; 18 C.C.(N.S.), 204, and *C. & H. & D. R. R. v. Hahn*, 4 Ohio App., 327; 22 C.C.(N.S.), 94. In those cases the plaintiffs injured by particles of exploded signal torpedoes were not passengers of the defendant railroads and were therefore en-

titled only to the exercise of ordinary care. In the present case the plaintiff as a passenger was entitled to a very high degree of care. The distinction is of no consequence for the present purpose, for the plaintiffs in the cases referred to failed, as the plaintiff in the case at bar must fail, for the reason that the injury sustained was, putting it at the highest, an extraordinary or phenomenal consequence, and not one within the range of consequences reasonably to have been anticipated.

For the reasons that I have thus stated, the verdict in the present case is without evidence to sustain it, and is contrary to law.

If the point of view thus far expressed be correct, it follows that the motion made at the conclusion of the evidence to direct a verdict for the defendant should have been granted. That same motion has been in effect renewed by the pending motion for judgment *non obstante veredicto*. For reasons I have attempted to state, a verdict for the defendant should have been directed at the conclusion of all the evidence, and the same reasoning requires that a judgment *non obstante* be now rendered. The only question remaining concerns the power of this court to grant such a motion at this stage of the proceedings. (There is here no foundation for a judgment on the pleadings, and none is claimed.)

I am forced to the conclusion that the desired power does not exist. The absence of such power does not arise from the prohibition of any statute, nor does it result from any wholesome limitation upon the powers of a trial judge. The limitation is found in judge-made law that has been grafted upon our practice and so recently re-stated by the Supreme Court that there seems no possibility of avoidance except by the enactment of legislation.

In the case of *Baltimore & Ohio Railroad Co. v. Nobil*, 85 O. S., 175, decided December, 1911, it is laid down in the syllabus as follows:

"In disposing of a motion for judgment notwithstanding the verdict of the jury, the trial court is confined to the considera-

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tion of the statements in the pleadings and the record outside of the statements in the pleadings should not be considered in deciding such motion. *McCoy et al v. Jones et al*, 61 O. S., 119, approved and followed."

In the *Nobil* case, moreover, the court expressly approves its former holding in *Challen v. Vincinnati*, 40 O. S., 113. In the latter, the plaintiffs during the course of the trial, in open court, had made an admission which destroyed their case and that, too, as a matter of law. After verdict for the plaintiffs, the court, acting upon this admission, rendered judgment for the defendant, incorporating in the judgment entry a statement of the admission. By a *per curiam* opinion the court

"*Held*: Admission made during the jury trial not incorporated into a pleading was only a part of the evidence and has no place in the record except in the bill of exceptions. Hence, the statement on the journal must be disregarded. On such a motion the court could only look at the pleadings."

The results in the three cases referred to were unnecessary. In each instance the conclusion was predicated upon a statute now known as General Code, Section 11601:

"When upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party."

The court treated this statutory provision as exclusive although the statute does not profess to have this scope. It does not follow that the power of a trial court to render judgment upon the pleadings in favor of one party notwithstanding a verdict of the jury in favor of the other, is exclusive of the further power to render a judgment notwithstanding the verdict, where the party who has prevailed before the jury has failed to make a case sufficient in law. However, the state of our practice, as determined in *R. R. Co. v. Nobil*, *supra*, is no longer open to dis-

tion or evasion. It follows that in the case at bar the motion for judgment *non obstante veredicto* must be overruled.

This result is unfortunate for the parties and reflects distinct discredit upon our methods of legal administration. A brief consideration of the future possibilities of the case at bar will make this clear.

As the record stands, the case has been fully, and it is believed, fairly tried. It is not suggested on either side that there has been substantial error in the receiving or rejection of evidence. The charge of the court to the jury is not criticised. Both parties have had the fullest opportunity to develop their respective cases, and every function of a trial before a proper tribunal has been fulfilled. The jury has returned a substantial verdict for the plaintiff which she should be allowed to enforce if the verdict is founded in law. On the other hand, the defendant has now obtained a deliberate judgment that it is under no legal responsibility to the plaintiff upon the facts of her case. If a judgment for the defendant were now entered, the parties might decide to abide by that conclusion, or the plaintiff would have the opportunity, by proceeding in error, to take the opinion of the reviewing court. Should the latter course be followed the reviewing court might approve the decision of the trial judge and thus end the litigation, or it might take the contrary view that the verdict actually rendered was justified in law, uphold the proceeding in error and enter final judgment upon the verdict.

As our practice now is, by virtue of the conclusive determinations of the Supreme Court, it is not open to the trial judge to permit or at least to enforce this sane and simple procedure. On the contrary, the verdict must be set aside, the parties put to a new trial, with a duplication of expense in the preparation of the case, in securing the attendance of witnesses from a distance, the public business delayed by a rehearing of the same witnesses at a scandalous waste of public funds for the payment of court officials and jury fees. As a result of such second trial, the then trial judge may find himself in the precise dilemma now confronting the court. Or a verdict may be directed for the

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defendant, or a verdict obtained for the plaintiff, or it may happen that error will occur in the admission or rejection of evidence or in the charge of the court to the jury, requiring a third trial at the order either of the trial court or the appellate court. If at such second trial a verdict be directed for the defendant, the reviewing court may take a different view of the law and send the case back for a new trial. If a jury verdict for either party be had and judgment be entered thereon, the reviewing court may find it necessary to reverse and remand. In short, whatever be the outcome of such second trial, the case will not have been advanced one particle beyond the point now reached.

It would seem that a practice which invites such uncertainty and gross delay and unnecessary public and private expense would long ago have been discredited as archaic and absurd. On the contrary, it has been insisted upon, and from time to time reinforced.

Quite recently the Constitution of the state was amended by a process involving great expense and much disinterested effort to carry out the slogan of "one trial, one appeal." Yet for no conceivable reason we cherish an archaic practice which courts, and in fact requires repeated trials and also repeated reviews of one and the same case.

Of course, this unfortunate necessity arises from an error on the part of the trial judge. The error, however, is not ordinarily discreditable, but rather the reverse. The trial judge, called upon to examine the plaintiff's case before submitting it to a jury, should properly indulge every consideration in favor of such submission. If in the press of trial the judge indulge too large a liberality to plaintiff, seeking to support a doubtful case, upon some theory which his maturer judgment can not approve, the effort is at least commendable and should be encouraged. Where such doubt arises, as it constantly arises, in litigated cases, the trial judge should be permitted to take the opinion of the jury upon that theory of the case most favorable to the plaintiff, and thereafter if such theory seem to him totally unsupportable, to enter judgment for the other party

notwithstanding the verdict. If this practice result in fewer instructed verdicts on the part of our trial judges no one can be heard to complain. Certainly not the side of the plaintiff, which will not have to fight so hard to secure the opinion of a jury, nor yet the side of the defendant, whose every right and every possibility of success will be preserved in the power of the court to render judgment notwithstanding the verdict and directly contrary to the verdict. Moreover, the practice advocated will not infringe upon the so-called scintilla rule, for its adoption will permit the trial judge to do after verdict only that which, if fully advised, he would have done before verdict, to-wit, direct a verdict for the defendant (usually), on the ground that the plaintiff's evidence was insufficient in law to warrant a recovery, or, in other words, that there was no evidence tending to support an essential element of the plaintiff's claim. Manifestly, where there is conflict of evidence upon essentials there can be no directed verdict and no judgment notwithstanding the verdict.

The practice on the part of trial judges of taking a verdict from the jury with leave to enter contrary judgment after verdict has long obtained in the English courts. In many of our state jurisdictions the present Ohio practice still obtains, and in others it has been suffered until changed by statute. Among the jurisdictions last referred to are Pennsylvania (act of April 22, 1905, 6 Purdon's Digest, Supp. 7139), and Massachusetts (act of April 19, 1915, Gen. Acts 1915, Chap. 185, p. 166).*

*GENERAL ACTS OF MASSACHUSETTS, 1915.

Chap. 185. An Act to Amend Judicial Procedure in Respect to Practice at Trials.

"SECTION I. Chapter one hundred and seventy-three of the Revised Laws is hereby amended by striking out section one hundred and twenty and inserting in place thereof the following: Section 120. When exceptions to any ruling or direction of a judge shall be alleged, or any question of law shall be reserved, in the course of a trial by jury, and the circumstances shall be such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages

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If the case at bar were an isolated or peculiar instance, the foregoing discussion would be futile. It happens, however, that it is merely an instance of what daily occurs in greater or less degree in every trial court. I may say that I was at first of the impression that the remedy for this absurd practice lay in the hands of individual judges by simply doing what common sense

or otherwise than as was done at the trial, the judge may reserve leave, with the assent of the jury, so to enter the verdict or finding, if upon the question or questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact that may have been submitted to them, shall be entered on the record of the proceedings, and if upon the question or questions of law it shall be decided, either by the same court or by the appellate court, that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly and, when so entered, it shall have the same effect as if it had been entered at the trial.

"SECTION II. Nothing herein contained shall be so construed as to limit the powers of the court conferred by chapter two hundred and thirty-six of the acts of the year nineteen hundred and nine or by chapter seven hundred and sixteen of the acts of the year nineteen hundred and thirteen.

"Approved, April 19, 1915."

ACT OF APRIL 22, 1905—Pennsylvania (6 Purdon's Digest, Supp. 7139.)

"35. Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; *whereupon* it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the supreme or superior court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

and justice require, and what no statute forbids. In fact, this summary action has occasionally been resorted to and the result apparently approved by the reviewing courts. It will be found, however, that these instances may be plausibly justified as judgments rendered *on the pleadings*, or else have escaped challenge under the beneficent mantle of affirmance without report. In truth, however, the present Ohio practice is definitely and unmistakably laid down by recent decisions of our highest court and may not be departed from without the sanction of legislative enactment.

In the case at bar the motion for judgment *non obstante veredicto* is overruled and the motion for a new trial granted.

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NEGLIGENCE IN THE OPERATION OF AN AUTOMOBILE.

Common Pleas Court of Franklin County.

FRANCISCO DI FERNANDO v. C. D. BOWERS.

Decided, April Term, 1918.

Pedestrian Struck at Crossing by Automobile—Non-Suit Asked on Ground of Contributory Negligence—Requirement of the Statute with Reference to Degree of Care to be Exercised by a Chauffeur—Charge of Court.

1. In order to warrant a non-suit in an action for injuries, the court must be satisfied that plaintiff was negligent, and if plaintiff's evidence has tended to show that the defendant was also negligent, a finding becomes necessary that the plaintiff's negligence contributed as a proximate cause of his own injury.
2. In the enactment of Section 12603, providing that "whoever operates a motor vehicle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person," the Legislature did not intend to eliminate therefrom the common law rule of ordinary care, or to incorporate therein a standard of care and duty which might be adopted by a jury under the influence of caprice or a temporary whim, but merely embodied in statutory form the common law rule of reasonable and ordinary care in view of all the circumstances of the time and place.

Hays & Hays, for plaintiff.

C. O. Beals and *D. B. Sharp*, contra.

KINKEAD, J.

Plaintiff charged defendant with negligence in operating an automobile on the streets of Columbus. As he was attempting to cross in front of the approaching machine he was struck and injured. It is charged that when plaintiff was ten feet from the curb he was struck and knocked down. Before attempting

to cross plaintiff avers, and the evidence disclosed, he stopped and looked along the street and saw the motor vehicle 100 feet away. The claim is that relying upon the ability of defendant to operate the car in a reasonable and proper manner, plaintiff attempted to cross the street.

The allegation is that the motor vehicle was operated in a grossly negligent and careless manner, being driven at the rate of 25 miles per hour; that defendant gave no warning, or sounded no horn or whistle.

A verdict was rendered in favor of plaintiff.

On motion for new trial defendant contends that non-suit should have been entered in accordance with the doctrine of *Schmidt v. Schalm*, 20 C.C.(N.S.), 99 (2 Oh. App., 268). It is insisted as stated in the opinion that—

“it is immaterial that the automobile which struck the plaintiff was being driven at a negligent rate of speed at the time of the accident. The plaintiff having contributed to her own injuries can not recover against the defendant, no matter that he was negligent.”

To have been warranted in entering non-suit it was essential for the court to have been satisfied that plaintiff was negligent, and if the plaintiff's evidence tended to prove the defendant also to be negligent, it then would have been essential to find that plaintiff's negligence contributed as a proximate cause of his own injury.

At the close of plaintiff's evidence the facts and circumstances were not in dispute. But the court was not satisfied that—

“the inferences to be drawn therefrom (were) reasonably clear and natural, or fairly inferable and not equivocal and (could) lead to but one conclusion.” (Ohio Civil Trials, Section 632; 69 O. S., 142; 64 O. S., 458; 69 O. S., 384),

and that plaintiff's negligence was the proximate contributing cause of his injury.

In the first place the court held the rule to be that the rights of plaintiff and defendant to cross and pass along the street were

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correlative and equal. That being so it was unable to conclude that the act of plaintiff in assuming that he could pass safely across the street in front of the approaching machine was such an act of contributory negligence as proximately caused the injury in a natural and continuous sequence, unbroken by an efficient intervening cause. If plaintiff was out in the street some distance when he was struck; if defendant was a hundred feet away when plaintiff saw him and started across, the inquiry would naturally be whether the defendant could not have seen plaintiff; whether he could not have operated his car so as to have avoided the injury.

At the conclusion of all the evidence it appeared that the street was full of employees going to their work at the Panhandle shops. Defendant's evidence tended to show that the machine was being run at a low rate of speed, due to the fact that so many people were in the street. The conditions thus disclosed, presented sharply the question whether the motor vehicle was driven at a speed greater than was reasonable or proper, having regard for width, traffic, use and the general and usual rules of the highway, or so as to endanger the life or limb of any person.

The facts and circumstances brought the case peculiarly within the inhibitions of Section 12603. A definite rate of speed was alleged in the petition, viz., 25 miles per hour, and proof in support thereof was offered. But no proof having been offered to show whether the place where the injury occurred was either a business or closely built up portion of the city, residential or otherwise, the question of violation of the provisions of Section 12604 was withdrawn from the jury. There being no evidence showing the nature and character of the portion of the municipality involved, there were no facts upon which to predicate a rule of duty by an instruction to the jury.

A charge must be predicated upon facts and circumstances disclosed by evidence. Section 12604 prescribes a rule of speed applicable to two kinds of territory within municipalities. In the absence of evidence disclosing the character of the locality, there was no warrant for presuming that the fifteen mile rule

should apply. There was simply a failure of proof on a material point.

The instruction given concerning the application of the rule of conduct prescribed by Section 12603 was not prejudicial to defendant.

In considering these matters frequently trial courts quite naturally give consideration to the scope and meaning of a statute like Section 12603. On one occasion in charging a jury the thought was expressed that the provision that the inhibition that one shall not drive a motor vehicle at a greater speed than is reasonable and proper seemed to confide unlimited discretion upon a jury to determine what it considers reasonable and proper, unaided by any known rules of law. But on further consideration the conclusion was that the statute merely embodied the common law rule of ordinary and reasonable care. Upon subsequently noticing the reasoning of Judge Wanamaker in *State v. Schaeffer*, 96 O. S., 215, the subject was given especial care. Its importance is magnified by the rule of *per se* negligence based upon the violation of a statute. The validity of Section 12603 was questioned because of alleged indefiniteness in its meaning. It was claimed that the words "reasonable" and "proper" were of such uncertain meaning that it is impossible for a jury to fairly determine what constitutes a violation of the statute; that a jury in one case might hold speed reasonable, while another jury might hold the same speed unreasonable under the same circumstances. Judge Wanamaker in his opinion states in respect to the meaning of Section 12603, the following:

"And when that meaning (of statutes) is thus clear and plain a court has no right to construe the language, because it needs no construction, and any attempt at definition, instead of clearing the statute, usually clouds it. What word or words of this statute are not as familiar to the average juryman as to a trial judge?"

We plead guilty; we undertook to instruct the jury what this statute meant.

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Once in a previous case, however, we stated to a jury the following in respect to Section 12603:

“This seems to confide large discretionary judgment and discretion to the jury. The court can give no interpretation to the statute beyond what its plain terms imply, when it is considered in connection with the one prescribing the rate of speed as it should be. It is for the jury to determine what in its judgment in a given case as disclosed by the evidence was reasonable and proper. But this statute should be considered in connection with the one prescribing the rate of speed, the statute prescribing a limitation as to the rate of speed being necessarily construed in connection with the one specifically limiting the rate of speed within a prescribed territory.”

The fact is that what are now Sections 12603 and 12604 were the outgrowth of the act of April 2, 1906 (98 O. L., 320), Sections 11, 12 and 28 thereof. It read as follows:

“No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, *having regard to the traffic and use of the highway*, or so as to endanger the life or limb of any person, or the safety of any property; *or in any event on any public highway* where the territory contiguous thereto is closely built up, at a greater rate than one mile in six minutes, or elsewhere in a city or village at a greater rate than one mile in four minutes, or elsewhere outside of a city, etc.; subject, however, to the other provisions of this act.”

Section 28 of the original act prescribed the penalty for violations.

Where there is evidence to which both sections apply, being kindred in nature and part of the original act, the two parts—or two sections—are to be considered together, and the meaning, purposes and intent thereof should be made clear by appropriate instruction.

The purpose of the injunction against running at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, seems clearly illustrated by the

evidence in this case. The street was crowded with men going to work, so that according to defendant's contentions, "No speed could be made." The traffic and use of the street imposed a special kind of care on the part of the driver so as not to endanger life or limb of any person.

But is it to be left to individual whim or caprice of jurors to assert a fleeting rule of care and duty?

It seems to have been the purpose to call for special consideration of the traffic and use of the highway at a special time. But is it clear that the statute designed to substitute the chance opinion of jurors as to what was reasonable and proper for the common law duty of ordinary and reasonable care, such care as ordinarily prudent persons are accustomed to exercise under like circumstances?

The answer is best expressed by Chancellor Kent:

"Statutes are construed in reference to the * * * common law; for it must not be presumed that the Legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts of every age; and when we consider the constant, vehement and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we can not be surprised at the great sanction given to this rule of construction." 1 Kent Com., 14th Ed., p. 464; 36 Cyc., 1145.

"Statutes are read and construed in the light of the common law." *Johnson v. Fleutsch*, 176 Mo., 452.

"No statute enters a field * * * before entirely unoccupied. It either affirms, modifies or repeals some portion of previously existing law; * * * it is necessary to have an * * * understanding of laws, * * * common and statutory. * * * Whether a statute affirms a rule of common law * * * or supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, and the latter must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law." *Black Intrp. Laws*, p. 233; *Perry v. Strawbridge*, 209 Mo., 621, 123 Am. St., 510.

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Statutes in derogation of the common law are to be strictly construed, especially if the statute is in derogation of common right. *Perry v. Strawbridge, supra.*

It follows as surely as night does the day, that it was not intended that the words "reasonable and proper" "so as to endanger life or limb" should abrogate the common law conception of negligence, ordinary care and prudence.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under such circumstances would not have done. The duty is dictated and measured by the exigencies of the occasion. *R. R. Co. v. Jones*, 95 U. S., 439; *Ohio Insts.*, Section 2091.

It seems clear, therefore, that the Legislature did not intend to read out of this statute the common law rule of ordinary care and negligence, or to read into it the standard of care and duty which might become fixed for the moment according to the temporary whim or caprice of the jury.

While it may be conceded for purposes of argument that Judge Wanamaker may be half right that an average jurymen might be as entirely familiar with the words as a trial judge, still we must be jealous of the respective functions of court and jury, so that the jury shall not be substituted for the court in the matter of interpreting and stating the law. It may be that some attempts at defining an apparently simple provision as Section 12603 may appear to be, "instead of clearing the statute" may "usually cloud it." But it seems clear that a consideration of the original act of which it was part in the light of the rule of construction before stated has far greater relevancy than the "rule of reason" of the *Standard Oil and Tobacco Trust Cases* (221 U. S., 1, and 221 U. S., 107). Far more relevancy indeed than questions of "reasonable doubt," "reasonable grounds" in criminal procedure.

Having given the statute much consideration in trials of a number of cases involving the statute, it was concluded that the statute merely embodied the rule of reasonable and ordinary care.

The following conclusion and instruction to the jury was given in this case:

"Section 12603 of the Code provides that a person shall not operate a motor vehicle on the public road or highway at a speed greater than is reasonable and proper, having regard for the width, traffic, use and general rules of the road, or so as to endanger life or limb of any person. This statute contains no specific inhibition against any particular rate of speed. It merely, in the judgment of the court, embodies the common law rule of ordinary and reasonable care, such care as ordinarily prudent persons are accustomed to observe under similar conditions and circumstances.

"The rule of law has always been that an operator of an automobile shall so run and operate it in a reasonably prudent manner, at a reasonable and ordinary speed, at such rate of speed as prudent drivers of motor vehicles are accustomed to run them under conditions and circumstances like those disclosed by the evidence in this case. That is the rule required by this statute which the court has read to you.

"The rule of ordinary care and the rule of this statute imposes upon a driver the duty of operating his automobile with reasonable consideration of the width of the street, the use and traffic therein at the time of an alleged injury.

"The rule of ordinary care and the rule of the statute read to you contemplates that a driver of an automobile in passing along a street should take into consideration the probability that he may come in contact with pedestrians passing across or along the streets and at street crossings.

"It is a rule of law that an act violating a rule of conduct prescribed by a statute of a state in itself constitutes an act of negligence. As the legal rule is stated, the violation of a statutory rule of conduct constitutes *prima facie* an act of negligence. In other words, it is in itself regarded as an act of negligence. But this rule of *prima facie* negligence adopted by judicial decision is of somewhat difficult application to the particular statute involved and to be applied in this case, a statute having incorporated into its terms what this court considers to be the common law rule of ordinary and reasonable care.

"To state that one shall operate a motor vehicle at a reasonable and proper rate of speed having regard for the width of a street, is merely to state that the same shall be run at such rate of speed as an ordinarily prudent person would or should ordinarily run the same under similar circumstances. Violation of

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this duty prescribed by common law and by the statute mentioned is to be regarded on its face as an act of negligence. That does not, of course, mean that it is the cause of an injury, but it merely demonstrates that it is to be regarded as an act of negligence. What the consequences of that act of negligence are then becomes a question of fact for the jury to determine. It has been stated by judicial opinion of our Supreme Court * *

* that the meaning of the language of this statute with reference to operating a car at reasonable and proper rate of speed is so clear and so plain that a court has no right to construe it; that it needs no construction; that any attempt at definition would cloud its meaning; that the words of the statute are as familiar to the average jurymen as to the trial judge.

"This court, however, instructs the jury that the purpose of the statute that a motor vehicle shall not be run at a greater rate of speed than is reasonable and proper, was not designed and did not repudiate the common law rule of ordinary care, and did not leave the rule of care in a particular case to the unlimited discretion of a jury and ungoverned by the common law rule of ordinary care, but it is for this court to explain its meaning and interpretation to the jury.

"It was not and is not the intent of the statute, in the judgment of this court, to allow the jury to apply the judicial rule of *per se* negligence for violation of such statute, and at the same time permit a jury to assert its unlimited discretion and view concerning what was a reasonable and proper rate of speed in the particular case, in disregard of common law rule of ordinary care, such care as reasonably prudent persons are accustomed to observe.

"The jury is, therefore, instructed that the rule of this statute is the rule of ordinary and reasonable care, such care as prudent persons are accustomed to observe under such circumstances, and that this is the rule to be applied to the conduct of the defendant as disclosed by the evidence.

"If the jury should be of the opinion or should find that the defendant was negligent in running his machine at the rate of speed at which it was run on this occasion, whatever that was, that he operated the same at an unreasonable and improper speed, not at such rate of speed as an ordinarily prudent person would or should have run the same, under like circumstances, then the jury should find the defendant guilty of negligence. On the other hand, if the jury should find that the defendant ran and operated his machine at a reasonable and proper rate of speed, at such rate of speed as an ordinarily prudent person

would or should ordinarily have run the same under similar circumstances, then you should find that defendant was not guilty of negligence in operating the same at an unlawful rate of speed."

It is urged that it was error to charge the jury in respect to giving a signal or warning. It is not required by statute. An instruction was given that:

"If reasonable and ordinary care under the circumstances disclosed by the evidence required the driver of the automobile to give signal or warning, it was the duty of the defendant to have given that warning, but this is for the jury to decide as a question of ordinary care and prudence," etc.

The court is of the opinion that the case was submitted to the jury without substantial error; that the verdict is sustained by sufficient evidence.

The motion for new trial is overruled. Judgment may be entered upon the verdict.

**DETERMINATION AS TO WHETHER A CONDITION OF USE WAS
A CONDITION PRECEDENT OR SUBSEQUENT.**

Common Pleas Court of Stark County.

GEORGE C. REITER, SR., v. THE PENNSYLVANIA COMPANY ET AL.

Decided, April Term, 1917.

Conveyance of Land for Railway Purposes Only—Otherwise to Revert to the Grantor, His Heirs and Assigns—Action in Ejectment, After Intermediate Conveyances, by Holder of a Quit-Claim Deed from the Original Grantor.

1. Where the shorter side of a circular strip of land 25 feet wide is defined by a radius of 400 feet, the other side is found by extending the radius 25 feet.

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2. Where A conveys land to B for the use of C for certain purposes, and B afterwards reconveys the same to A "subject to the qualifications and conditions set forth" in the deed from A to B, the legal title passes but the trust continues.
3. A provision in the deed that "said premises to be used for railroad purposes only; should they cease to be so used they shall revert to the grantor, his heirs and assigns," is a condition subsequent and the title vests upon delivery of the deed. A breach of the conditions does not *ipso facto* produce a reverter of the title and the right of forfeiture is not alienable.

J. W. Craine, for plaintiff.

McCarty & Armstrong, contra.

DUNCAN, J. (of Hancock county, sitting by designation of the Chief Justice).

This case is in ejectment. It was tried to the court without the intervention of a jury. The controversy is this:

On and prior to August 3, 1894, one W. H. Clark had the legal title and was in possession of lots No. 4835, 4836 and 4837 in the city of Canton, and on that day executed a deed of conveyance of parts of said lots to the Wrought Iron Bridge Co., a manufacturing institution located a short distance west. Said lots are about 150 feet long, east and west, and 47 feet wide, north and south, and front at right angles on the west side of Henry avenue, a north and south street. The parts of said lots conveyed consist of a circular strip of land twenty-five feet wide beginning for description forty feet north of a point on the east line of said lot No. 4836, where the northerly line of the right of way of the W. & L. E. Railroad intersects the west line of said avenue for its northeasterly corner, thence in a southwesterly direction across said lots in order on a curve of 400-foot radius to a point six feet north of the southwest corner of said lot No. 4837, as the northwesterly boundary thereof. The southwesterly boundary is found by extending the radius of the curve 25 feet and not by measuring along the west line of Henry avenue.

On February 26, 1895, said the Wrought Iron Bridge Co. reconveyed this strip to said W. H. Clark.

The Clark deed of August 3, 1894, contained this provision: "Said premises to be used for railroad purposes only; should they cease to be so used they shall revert to the grantor, his heirs and assigns." Also: "All said premises * * * shall be for the use of the Pittsb., Ft. W. & C. Railway Co., its successors and assigns." This company owns the road and the Pennsylvania Company operates it.

The bridge company deed of February 26, 1895, contained this provision: "Subject to the qualifications and conditions set forth in the deed of W. H. Clark to the Wrought Iron Bridge Co. bearing date August 3, 1894, recorded in Deed Records of Stark County, Vol. 315, pp. 517-519, to which reference is hereby had for a fuller description."

On March 1, 1895, said the Wrought Iron Bridge Co. executed a deed to the Pittsb., Ft. W. & C. Railway Co. for parts of said lots, but it only covers such part of the property here in dispute as lies on the southerly side of the northwesterly line thereof, one foot wide at Henry avenue, and running thence southwesterly up to a width of about fifteen feet where the northwesterly line of the strip intersects the north line of lot No. 4837. The balance of the description is so indefinite that it can not be lined off on the map.

On July 12, 1916, said W. H. Clark executed a quit-claim deed to the plaintiff Reiter for the strip first described, and the latter claims right of possession thereof for non-user under the conditions of the Clark deed of August 3, 1894.

The evidence shows that the defendants have maintained a track along the southerly side of this strip for fifteen years and more, and operated cars over the same in the management of their railroad, also, that during said period a track for about two-thirds of the way from west to east along the northerly side thereof, and when this action was begun, were so using the whole northerly side, though but for a short time.

What are the rights of the parties?

First. It is clear to me that the defendant, the P. Ft. W. & C. Railway Co. became the *cestui que trust* in the Clark deed of August 3, 1894, and that the reconveyance by the bridge com-

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pany to Clark, February 26, 1895, subject to the "qualifications and conditions," did not have the effect to terminate the trust. The trust in favor of the railroad company was thus saved in the deed and the conveyance could only affect the legal title. The deed of the bridge company to the railroad company of March 1, 1895, does not affect this controversy. While it covers a part of the strip in question, the bridge company had already conveyed the title to Clark by its deed of February 26, 1895.

Second. The title of the railroad Company is measured by the provisions of the Clark deed of August 3, 1894, and to determine its character it may be well to know whether the condition of the use is condition precedent or at condition subsequent, and it makes some difference in view of the right of the plaintiff to take advantage of the condition. 2d Elliott on Railroads, Section 940, lays down the distinction as follows:

"Where an act is required to be done before the title vests, it is a condition precedent, and the company can assert no rights under the deed without showing the performance of the condition. But, 'if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate; or, if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform, the act after taking possession, then the condition is subsequent.' "

The same rule is laid down in *Rannels v. Rowe*, 145 Fed., 296, U. S. District Court of Appeals.

The condition is not the building of a road or the performance of any act within a certain time, but "said premises *to be used for railroad purposes*." And the provision that "they shall *revert* to the grantor," "should they cease to be so used," presumes a vesting of the estate, else it could not revert. There can be no reversion where the title has not passed and there can be no cessation of something that has never occurred. Both these provisions are inconsistent with the claim that this provision is

U a condition precedent. I think the intention is manifestly apparent that the parties intended a condition subsequent.

The following are held as exhibiting instances of conditions subsequent:

A conveyance for the purpose of a site for a county school house and for no other purpose; and if not so used, the title to revert to the grantors. *Wagoner v. Wallowa Co.*, 1916 F., 303; 148 Pac., 1140.

A conveyance to a railway company upon condition that it should construct a certain length of road within a given time and upon default that the granted estate should revert. *Schlesinger v. Railway*, 152 U. S., 444; 38 L. Ed., 507.

A conveyance upon condition that a county should build a jail upon the property within two years and so occupy it forever. *Skipwith v. Martin*, 50 Ark., 141, 150; 6 S. W., 514.

A grant to a railway company of a right-of-way upon the express condition that it should construct its road within a time limited: *Nicoll v. Railroad*, 12 N. Y., 121.

A conveyance upon the express understanding and condition that an institution be permanently located on the land within a year and in case of failure the title should revert to the grantors upon repayment of the purchase money. *Mead v. Ballard*, 7 Wall., 290; 19 L. Ed., 190.

The right of re-entry for condition broken is not a reversion; nor is it any estate in the land. It is a mere right or chose in action, and if enforceable, it is because of the breach or failure of condition. But the power to forfeit for a breach of the condition is not alienable and is gone if the grantor attempts to convey. The only case in Ohio on the subject is *Branch v. Wesleyan Cemetery Directors*, reported by Judge Bates in a well considered opinion, in 29 Bull., 398. The same case is reported by the circuit court, 11 C. C., 185, where the rule is laid down in the third paragraph of the syllabus as follows:

“If the condition subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper steps were taken to constitute the forfeiture. This could be done only by the grantor during his

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lifetime, and after his death by those in privity of blood with him. In the meantime only a right of action subsisted, and that could not be conveyed so as to invest the right to sue in a stranger."

But the rule seems to be quite uniform from the earliest times to the present day, as will be seen by the following cases:

Rice v. Boston & Worcester Rd. Co., 94 Mass., 141. Judge Bigelow lays down the rule and the reason for it as follows:

"It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent can not be legally conveyed by deed to a third person before entry for a breach. This rule is stated in *Co. Litt.*, 214*a*, in these words: 'Nothing in action, entry or re-entry can be granted over;' and the reason given is 'for avoiding of maintenance, suppressing of rights and stirring up of suits,' which would happen if men were permitted 'to grant before they be in possession.'"

In *Schulenberg v. Harriman*, 21 Wall., 63 (22 L. Ed., 551), Justice Field said:

"It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down."

In *Ruch v. Rock Island*, 97 U. S., 692 (24 L. Ed., 1101), lands had been dedicated for schools and churches and the dedication was to become void if they should be used for other purposes. The grantor died and his heirs made conveyance of same to the plaintiff. Justice Swayne disposes of the proposition as follows:

"It was not denied by the plaintiff that the title had passed, and that the estate had vested by the dedication. If the conditions subsequent were broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until

the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime, only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger. Conceding the facts to have been as claimed by the plaintiff in error, this was fatal to his right to recover, and the jury should have been so instructed."

And there are other cases to the same effect, notably: *Seaton v. Chicago Storage Co.*, 16 Am. St. Rep., 274; *Nicall v. the N. Y. & Erie*, 12 N. Y., 121; *Paul v. Connersville & N. J. Rd. Co.*, 51 Ind., 527; *McMahon v. Williams*, 79 Ala., 288; *Dawson v. Western Md. Rd. Co. (Md.)*, 14 L.R.A.(N.S.), 809.

Third. I also hold that the user as found in the last paragraph of the statement is a substantial compliance with the condition and that no right of forfeiture would exist in any event.

Holding these views, there will be a finding in favor of the defendants. Motion for new trial overruled, when filed. Exceptions. Judgment on the finding. Exceptions.

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Rohr v. Gatch, Executor.

VALIDITY OF AN AGREEMENT TO SET ASIDE A WILL.

Common Pleas Court of Franklin County.

HANNAH ROHR v. H. B. GATCH, EXECUTOR, ET AL.

Decided, April Term, 1918.

Wills—Contract with Beneficiaries for Non-Resistance and Active Assistance in Setting Will Aside—Not Against Public Policy, When—Champerty and Maintenance.

1. A plaintiff in a suit to contest a will does not lose his right to maintain such action by reason of having entered into a contract with beneficiaries under the will not to resist such contest.
2. Plaintiff, the widow of the testator, contracted with all save one of the beneficiaries for their non-resistance and active assistance in the proposed contest of her husband's will, with compensation to them for losses sustained if the will was set aside and payment to the remaining beneficiary of the full amount of his legacy. Plaintiff seeks relief against the provisions of a trust and furtherance of the interests of all parties to the will.

Held: Such a contract does not violate the doctrine of champerty and maintenance, and is not against public policy. *Quaere:* May the court and jury, by verdict and judgment, legally ratify an agreement of parties to set aside a will. *Walker v. Hollister*, 20 N.P. (N.S.), 325, disapproved.

DeWitt C. Badger and J. J. Chester, for plaintiff.

J. F. Rogers and H. B. Gatch, contra.

KINKEAD, J.

This case is submitted upon a motion for new trial. At the close of plaintiff's evidence and upon renewal when all the evidence was offered, a motion was made by the defendant executor, to enter judgment in his favor and against the plaintiff. The motion called in question the validity of a contract made by the beneficiaries under the will, and challenged the right of plaintiff to maintain the action because of the terms and conditions of the contract.

This motion was overruled, the case was tried and the jury returned a verdict holding the will of Amos T. Rohr not to be

his last will and testament because of mental incapacity to make the same.

The question of validity of the contract is the ground relied upon in the motion for new trial.

The contract was made by plaintiff as widow of Amos T. Rohr, with Nettie Rohr, John J. Rohr and Mary Gallagher. It relates that plaintiff desires the assistance of the persons named in her action to contest the will, and promises to compensate them for the loss they will sustain in case the will is set aside. The legatees agree not to resist plaintiff's action. Plaintiff agrees that if she is successful in having the will set aside, she will deed to the second parties, the legatees above named, all the real estate of Amos T. Rohr, deceased, reserving to herself a life interest and estate in all of the property.

The second parties to the contract agreed to pay to Demarus May Hall, legatee named in the will, the sum of \$100 as provided in the will. The last named legatee was not a party to the contract. The second named parties to the contract agree not to contest the action, and to render first party every assistance in their power in the prosecution of the action.

In support of the claim of the executor, *Walker v. Hollister*, 20 N.P.(N.S.), 235, is cited. It appears in that case that a legatee under the will was induced by the contestant—the plaintiff—to file an answer joining in the prayer of the petition, in consideration of an agreement signed by plaintiff, by which the latter agreed to pay the legatee the amount of her legacy, the sum of \$10,000, in the event the will was set aside, and the plaintiff should come into possession of her testate sister's property.

In that case it appeared that plaintiff purchased other legacies at a discount, her purpose and intent being to compromise her action and to have the will set aside by making an adjustment with each beneficiary thereunder.

In deciding *Walker v. Hollister*, *supra*, Geoghegan, J., took the position that it is contrary to public policy to make contracts having for their object the setting aside of a will. He contends that public policy of the state requires that wills should be sustained. In support of this position certain language of

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Spear, J., and *Wagon v. Ziegler*, 44 O. S., 59, 66, is cited and relied upon. In the latter case, the question was the power of the court to enter judgment analogous to that of non-suit in a will contest. The introduction of jury trials in will contests was cited as evidencing a purpose to prevent the setting aside of wills by consent decrees, as was frequent in chancery under the old practice. Spear, J., contended that the requirements of jury trial negatived the idea that the Legislature intended to encourage the setting aside of wills by consent of parties.

Judge Geoghegan, in his opinion, *supra*, adverted to the fact that certain decisions hold that family arrangements may be made by the consent of all, after their interests have become vested. He mistakes the vital point in *Ridenbaugh v. Young*, 145 Mo., 274, cited in support of his conclusions. The court in that case recognized the validity of a contract by a brother with his sister, to pay a certain sum, to-wit, \$10,000, if he, as plaintiff in an action to contest a will, succeeded in having it set aside. But the contract there involved contained a provision disclosing a clear purpose to cheat another devisee named in the will, which of course was condemned. Such devisee was not to plead his relation to the testator, the contract being set aside for that reason. Judge Geoghegan laid special stress only upon the discussion in the opinion having relation to champerty and maintenance, and overlooked the facts disclosing design to cheat found in the contract.

The contract involved in the case at bar was signed by all legatees excepting one, though it provides that the legacy of the omitted party shall be paid, and she appears at the trial and gives testimony against the will. There is a vast difference between the two contracts.

The complaint of the contesting party in the case before the court has relation to the provisions of trust reposed in the executor, the agreement in respect to the proposed contest containing no provision injurious to those actually interested in this will. Their rights have all become vested, and they are competent to contract in respect to them. It discloses no purpose to control the regular administration of justice for pecuniary consideration and does not involve anything inconsistent with

full and impartial justice. It is a contract made in respect to a legal right which plaintiff has to maintain an action. The apparent purpose is to further the supposed interest of all persons interested in the will, by withdrawing its control from the executor whose course in administering the estate may probably destroy the estate. Whether it actually accomplishes such purposes is not for the court to say.

It does not tend to encourage improper or unfounded litigation unless it may cause parties to give testimony they might not otherwise give. But whether it has such tendency, or whether it may have, or whether such agreements may have in any case, can be considered and determined on trial so that any evil tendencies that might arise by sustaining such contracts may always be guarded against by the trier of facts, which in will cases is the jury.

I can not perceive how such a contract can violate the doctrine of champerty or maintenance. There is scarcity of consideration of the precise question among the authorities. In *Grochowski v. Id.*, Nebraska, 13 L. R. A., 484, it was held that a contract by one interested in defeating the probate of a will agrees to interpose no objection thereto, is not void as against public policy, unless it be made collusively, and in fraud of other parties interested in the estate.

It is held in *Waller v. Marks*, 100 Ky., 541, that a contract between an heir at law of a testatrix and the legatees and devisees under the will, that in consideration of the abandonment of a contest of the will by the heir, the legatees and devisees will pay him the amount of a bequest which the testatrix intended to give him by will, but which was omitted by mistake of the draftsman, was not against public policy and not in violation of law against champerty and maintenance.

In *Ruth v. Krone*, 10 Cal. App., 770 (103 Pac., 960), a promise by a legatee in a prior will to waive his rights to contest a later will excluding him, is a legal one, and is a valid consideration on which to rest an agreement with the legatees under the later will by which they agree to compensate him for such waiver. It was held legal and enforceable unless it was tainted with fraud. In the absence of a contrary showing

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such an agreement is presumed to be fair and honest. (40 Cyc., 1245, Note 51.) See 95 Md., 451; 14 N. Y. St., 376; 7 Rich (S. C.), 453; 10 Lea, 421.

The great weight of authority it is said supports the legality of contracts to refrain from contesting the validity of a will.

The evidence produced on behalf of plaintiff does not tend to show improper motives and the court upon careful consideration considers the contract legal and therefore it does not constitute ground for dismissing the action or in directing a verdict sustaining the will.

The great weight of authority supports the legality of contracts to refrain from contesting the validity of a will as is indicated in the following cases:

Schoormaker v. Gray, 208 N. Y., 209; Ann. Cas. 1914 D. 510, and Note page 512, where a number of cases will be found cited.

It is to be noticed that all the authorities there collected excepting one, involve cases where the agreement was to abstain from contesting. In one particularly strong decision, cited in a late case, it was shown that the testator had intended to make a certain devise to a certain person, but by mistake the draftsman left it out of the will. The person thus omitted by mistake was proceeding to contest the will, and rather than have a contest, it was agreed among all the heirs that it would pay that omitted person the amount of the intended legacy. In the present case the circumstances are different. The effort here is to enter into an arrangement to contest and to set aside the will.

The effort of the parties here is to give every one of the persons interested in the will the same rights as they have by virtue of the will. The sole object is to get rid of the management and disposition of the property by the executor. It appears that the property is mortgaged so that there is nothing that the executor can do but to sell it and close up the estate. This would probably result in almost complete loss, whereas by the terms of the agreement the property might be handled by the parties in interest and possibly saved. No one having any beneficial interest loses anything.

Counsel for the executor has cited many cases on the motion

for new trial, but their examination discloses nothing militating against the views expressed by the court.

Our conclusion is that the rights of all the real parties in interest under the will having become vested, they had a right to make the kind of contract shown, and for the purposes disclosed, there having been no fraud committed or public policy violated. Plaintiff had a right to prosecute an action to contest the will; all the parties had a right to make a contract in respect to their vested rights in the event that plaintiff was successful in maintaining the action. The contract, nor did the contest therefor, involve any injury to any person having a beneficial interest in the estate.

It was not an agreement to obtain a formal annulment of the will, but the action to contest was to be a *bona fide* one, tried upon the evidence and under the law.

There may be serious doubt concerning a practice which is becoming common, to have wills set aside by agreement and consent of all parties interested, to have the rule of descent substituted for the law of the will, or other arrangement.

Under the old Constitution and under special statutes wills were contested in chancery. Many wills were set aside by agreement of parties. This old practice no doubt is what Brinkerhoff, J., had in mind, in *Walker v. Walker*, 14 O. S., 157, 176, when he stated:

“The statute imperatively requires that ‘an issue shall be made up whether the writing produced be the last will of the testator or not, which shall be tried by a jury, * * * the statute is imperative * * * it was deliberately enacted with a view to prevent a disposition of cases for the contest of wills upon the mere consent and acquiescence of parties in any form.’” See also 44 O. S., 59, 66.

This may call for serious consideration whether court and jury may ratify an agreement of parties to set aside wills by the formal rendition of a verdict and judgment.

But the agreement under consideration was one contemplating an actual action to contest, and adjusting their rights in the event that the will be set aside. This is precisely analogous to an agreement between husband and wife adjusting

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their property and alimony rights in the event of a decree of divorce.

The motion for a new trial is overruled. Judgment may be accordingly entered upon the verdict invalidating the will.

NECESSARY PARTIES TO AN ACTION TO DETERMINE A TRUST.

Common Pleas Court of Montgomery County.

ANNE E. PARROTT v. EMILY PARROTT.

Decided, July 2, 1918.

*Trusts—Parties Necessary to Determine Disposition of Trust Property—
Application of the Doctrine of Representation to Persons Holding
Contingent Interests Only.*

In an action to construe a will by determining rights growing out of a trust, persons holding contingent interests thereunder need not be made parties individually where they are in court by representation.

SNEDIKER, J.

This action was originally brought by the plaintiff for the purpose of selling what she claims is entailed property, under the will of Charles Parrott, deceased.

Upon the filing of the petition Frederick N. Sinks, who is the guardian of Mabel Parrott, who is a surviving child of Charles Parrott, by leave of court was made a party defendant, and filed his answer. Among other things he recites that after the death of Charles Parrott, George W. Sinks was appointed executor of the last will and testament, and that on or about the first day of April, 1914, he (George W. Sinks) filed in the Court of Common Pleas of Franklin County, Ohio, his petition against Anne E. Parrott, Mabel Parrott and George W. Sinks, trustee under the will of Charles Parrott; that in that suit he set forth the last will and testament and codicil of Charles Parrott, deceased, and asked a construction of the court on Item 4 of the will and Item I of the codicil; that Anne E. Parrott and Mabel Parrott, then surviving their sister, Elizabeth Parrott, filed

their answers and cross-petitions, wherein they alleged that the first item of the codicil of the will was null and void, and prayed the court to so find; and that George W. Sinks as trustee filed his answer and cross-petition and claimed that Item I of the codicil of Parrott's will was a valid and subsisting provision of said codicil, and also claimed that, by this item, there was created a trust fund for the use and benefit of the daughters of Charles Parrott—that is, Anne E. Parrott and Mabel Parrott, and as trustee he denied that there was any question of law as to the validity of the trust created by Item I of the codicil, or as to the validity of Item 4 of the will.

Thereafter the court upon the pleadings, evidence and arguments of counsel and on consideration of the issues involved, found that by his last will and testament Charles Parrott conveyed the fee simple title of all of the property of which he died seized or possessed, real, personal or mixed, to his three daughters, Elizabeth Parrott, Mabel Parrott and Anne E. Parrott, who survived the decedent, and that after the death of said decedent, Elizabeth Parrott died intestate, without heirs of her body, and that thereupon Anne E. Parrott and Mabel Parrott became vested of all of the right, title and interest of Elizabeth Parrott in and to all of the property of the decedent. The court further found that the provisions of Item I of the codicil of the last will and testament of Charles Parrott are null and void and of no effect in law.

To this answer there has been filed by the plaintiff a general demurrer, and this demurrer has been presented to the court upon the theory that at the time of the rendition of its finding and decree the Court of Common Pleas of Franklin County had not before it all the necessary parties and on this account such finding and decree ought not to be considered as finally determining the rights of the plaintiff.

The proceeding in the Court of Common Pleas of Franklin County was brought by the executor under favor of Section 10857 of the General Code. This section reads:

“An executor * * * may sustain an action in the court of common pleas against the creditors, legatees, distributees or other parties asking the direction or the judgment of the court in any matter respecting the trust estate or property to be adminis-

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tered, and the rights of the parties in interest in the manner and as fully as formerly was entertained in courts of equity.”

Such an action as is here provided for is not for the benefit of any particular person. “It is in effect an action against all persons to be affected by the construction given to the will. The executor says, “I am in doubt about your rights, and I call you into court that you may defend them, or have an opportunity to do so.” And the construction given to the will by the court concerns the execution of the trust with reference to which the executor asks the court’s advice. In the 17 Ga., at pages 223-224, the court say:

“It is a well known general rule, that all persons materially interested in the subject, should be made parties to the bill, so that the court may be enabled to do complete justice, by deciding upon and settling the rights of all interested, and future litigation may be prevented. Where a suit, by a trustee, is on account of any matter which concerns the execution of the trust, then the case falls within this general rule; and unless some reason of necessity forbids it, the *cestui que trust* must be made a party. In such case, the *cestui que trust* has an immediate and material interest in the subject-matter of the suit, and it is proper he should be made a party.”

Did this executor by his proceeding, as described in his answer herein filed, bring before the court sufficient parties to entitle the court to determine respecting the trust property, or the property to be administered, and the rights of the parties in interest?

It will be observed that this section is intended to carry into the code the former proceeding had in equity for the same purpose, and in a construction of the rights of the executor and of any parties in interest we ought to be governed as nearly as may be by the rules laid down by the courts of equity with respect thereto.

As heretofore indicated, generally speaking, under the code all parties in interest should be brought before the court when it is asked to determine as to their rights. But they may be so brought into court in two ways: individually, or through representation.

As said in the 15 Encyclopedia of Pleading and Practice, at page 627:

"Another and perhaps the most important of all the exceptions to the general rule under consideration comprises the group of cases which have given rise to what is known as the doctrine of representation.

"This doctrine, tersely stated, is to the effect that where it appears that a particular party, though not before the court in person, is so far represented by others who are before the court that his interests receive actual and efficient protection, his actual joinder may be dispensed with, and the decree may be held to be binding upon him."

With respect to matters in trust, Story, in his "Commentaries" on "Equity Pleadings," at Section 150, says:

"Indeed, it may be laid down as a general rule, that, where any persons are made trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs or as defendants, without bringing before the court the creditors or legatees, for whom they are trustees, which in many cases would be impossible. In such cases the trustees, like executors, are supposed to represent the interests of all persons, creditors, or legatees; and, indeed, the impracticability of making the other persons parties, would seem of itself a sufficient ground for dispensing with them."

In the 8 Ohio Reports, at page 498, the syllabus reads:

"A conveyance in trust may be canceled by a decree in equity so as to bind the interests of all, though the *cestui que trusts* be not made defendants."

It is laid down in Mitf. Pl. (3d Ed.), 142, that—

"Trustees of real estate for the payment of debts or legacies may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, and the rights of the creditors or legatees will be bound by the decision of the court against the trustees."

In 2 McLean's U. S. Reports, pages 267-305, the court say:

"That the suit may be maintained in some cases in the name of the trustee, without naming the *cestui que trust*, is admitted; but this can not be done where the object of the suit is to divest the vested right of the *cestui que trust*."

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The objection made by counsel supporting the demurrer, to the proceeding in the Franklin County Court of Common Pleas, is that others than Anne and Mabel, named in the first item of the codicil, were not also made defendants.

A reading of this item will at once reveal that the interest of such others was contingent and not vested, and that they, therefore, do not come within the prohibition of the rule last quoted, as laid down by the Supreme Court of the United States.

As said by the Supreme Court of Illinois, 115 Ill., at page 644:

“The title is in the trustees, and the duty is imposed upon them to protect and preserve this interest for whomsoever shall be ultimately entitled to it. They are parties to the suit, and they stand for and represent, in this litigation, the ownership ultimately entitled to this fund, and such ownership is bound by their representation.”

In that case, “the testator devised \$2,000 to his executors in trust to invest the same and pay his daughter the interest or profits during her life, and after her death to pay such interest or profits to her child or children until they became of age, and at their majority, to pay to them the principal sum. If his daughter should die leaving no issue, the principal was to be added to his other estate, which he devised to two religious societies. *Held*: “That her only child was not a necessary party.”

In 1 Schoales & Lefroy's Reports, the chancellor in passing on the case used this language:

“It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred; this is now considered the settled rule of courts of equity, and of necessity.”

See, also, Story's Eq. Plead., Section 145.

We may conclude, therefore, that under the rules of equity which we are required to apply to the right of the court to proceed in the Franklin county case, there was no obligation of the plaintiff to attempt, or of the court to require, the making of any other defendants than the trustee and the first tenants in tail, the remaindermen after such first tenants in tail having only a contingent interest the likelihood of the vesting of which was remote.

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If the Franklin county court did have before it all the necessary parties, and by reason thereof had the right to proceed to a determination of the questions raised by the petition of the plaintiff in that court, then such determination is binding upon us, and the demurrer to the answer of Frederick N. Sinks should be overruled, which is accordingly done.

**CONSIDERATION FOR MAINTENANCE OF A RAILWAY
CROSSING.**

Common Pleas Court of Hancock County.

JUDSON HARMON ET AL, RECEIVERS, v. TOLEDO, BOWLING GREEN
& SOUTHERN TRACTION CO.*

Decided, April Term, 1917.

Maintenance of Crossing—Of Traction Company Over Private Right-of-way of Steam Road—Contract so to do May be Enforced by Steam Railway Company—Right to Cross Distinguished from Manner of Crossing.

In the absence of a statute, the right of a traction company to cross the private right-of-way of a steam railway company is a sufficient consideration to support a contract between the two for the construction and maintenance of the crossing by the former.

Harlan F. Burket, for plaintiff.

E. V. Bope, contra.

DUNCAN, J.

Heard on demurrer to third defense.

The plaintiffs, Harmon and Smith, are receivers of the Cincinnati, Hamilton & Dayton Railway Company, and operate a railroad running from Cincinnati to Toledo, with a branch line in Wood county, running from North Baltimore to Tontogany. The defendant, the Toledo, Bowling Green & Southern Traction Co.

*Affirmed by the Court of Appeals in the following memorandum:
"Judgment affirmed on the reasoning of the opinion of Duncan, J., in deciding the demurrer, so far as concerns the question of liability under the contract in issue."

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owns and operates an electric railway running from Findlay to Toledo and crosses said railroad at grade in the country about two miles north of North Baltimore.

The Cincinnati, Hamilton & Dayton Railroad was built first, and at the place in question, the company owned the land it occupied. The traction company on November 11, 1901, then extending its line northward from North Baltimore, and desiring to cross said railroad at said place, entered into a contract with said railroad company whereby the traction company was to put in the crossing over and across this private right-of-way and tracks of said railroad at its own expense, that said railroad company should thereafter maintain and renew the same whenever necessary and that the traction company should pay the expense thereof. Said crossing was accordingly constructed by the traction company and all bills for maintenance and renewals have been paid by it until the month of July, 1914, when it became necessary for the plaintiffs to put in a new crossing at said place at the expense of \$227.38, which the traction company refuses to pay. Hence this lawsuit.

The traction company in its third defense claims that ever since the said crossing was first constructed it has been maintained for the mutual benefit and common interests of both companies and that under the statute it is liable only for one-half the expense of all necessary maintenance, repairs and renewals.

The question submitted on this demurrer is whether the traction company is liable for the whole cost under the contract, or for the one-half only under the claim of the statute. In other words, was there any consideration for the burden sought to be cast upon the traction company by said contract?

There are now several sections of the statute providing for the crossing of one railroad by another or by an electric line. The contract here in question was made in November, 1901, and the rights of the parties are to be determined in view of the statute law on the subject then in force. Many of the statutes referred to in argument find application to crossings within municipal corporations only. This crossing is not only outside of any municipal corporation, but is on a private right-of-way. And whether applying to conditions either within or without a municipal corporation, they only provide for the "manner of

crossing" where both have or may acquire the "right to cross," as on a public street, or on private property by contract or appropriation proceeding. The principle is recognized in *Hydell v. Toledo & Ohio Central Ry.*, 74 Ohio St., 138. The first paragraph of the syllabus of that case reads as follows:

"When one railway company desires to cross the tracks and right-of-way of another railway company at a common grade, it is competent for such companies to agree, as between themselves, upon the terms of crossing, including the compensation for the right to so cross, the payment of the expense of constructing and maintaining the crossing, the installing and maintaining of an interlocking system, as well as to which of the two companies shall employ, control and pay the necessary flagman or towerman to operate the interlocking system. Such a contract is not prohibited by Section 247e, Revised Statutes."

If the "manner of crossing" were to be determined under the present statute, however, Section 8834, General Code, it would be observed that this section does not attempt to determine the "right to cross," but whether the proposed crossing should be at grade, underenath or overhead. If the place of crossing is on a public street or other highway, the right of one company to use it is the same as that of the other, regardless of the priority of occupancy; in which case, of course, it may be true that there would be no consideration for the burden sought to be cast upon the junior company to put in the crossing and bear the whole cost of its maintenance; I mean under the present statute. (1 Elliott, Contracts, Section 215, lays down the principle in the following language:

"Neither the promise to do, nor the actual doing, of that which the promisor is, by law or subsisting contract, bound to do, is a sufficient consideration to support a promise made to the person upon whom the liability rests, either to induce him to perform what he is bound to do or to make a promise so to do. For this reason if one does, or promises to do merely that which the law requires of him, it is no consideration for a return promise."

To the same effect is 1 Page on Contracts, Section 311; *Sherwin v. Brigham*, 39 Ohio St., 137; *Withers v. Ewing*, 40 Ohio St.,

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400; *Snyder v. Schardt*, 9 C.C.(N.S.), 615; *Arend v. Smith*, 151 N. Y., 502; *Warren v. Hodge*, 121 Mass., 106; *Shortle v. Terre Haute*, 131 Ind., 338, and other cases.

But the right to cross the lands or right-of-way of another involves private property, and it can make no difference that the same belongs to a railroad company or is occupied by a railroad; and while it is subject to appropriation for railroad or other public purposes not destroying its present public use, the owner is entitled to compensation for the land so taken. This right is guaranteed to every person by Article I, Section 19, of the Constitution of Ohio, which provides that where private property shall be taken for public use, compensation therefor shall first be made in money, or first secured by deposit of money, and its value assessed by a jury; and the principle has found application in *Lake Shore & M. S. Ry. v. Cincinnati, S. & C. Ry.*, 30 Ohio St., 604. Paragraph 7 of the syllabus reads as follows:

“The right of a railroad corporation to hold land is not an unqualified right, but it is limited to the uses and purposes of the corporation, and is to be held for the purposes of the grant for public uses. The title which it has in its right-of-way, is a qualified title, subject to the equal right of another railroad corporation to cross the same with its track, provided compensation be made as required in the case of individuals for the property appropriated, or the interest therein which is so appropriated.”

Paragraph 10 reads as follows:

“In a proceeding under the statute to appropriate a right-of-way across the track of an existing railroad, to be used in common, as a railroad crossing, the owner of such track is entitled to compensation for the property or interest therein, actually appropriated, and for such consequential damages, not provided for by the act of 1860, as are the direct and proximate consequence of such appropriation.”

Accordingly, when the Legislature provided the procedure by which the “manner of crossing” might be determined, as set forth in Section 8834, General Code, and the right to have the

costs of the original construction and maintenance of the crossing apportioned among the parties interested, as set forth in Section 8836, General Code, it also provided a method in the same act, now Section 8838, General Code, whereby the compensation to be paid the owner for the land occupied by the crossing might be determined. Said Section 8838, General Code, reads as follows:

“Unless such companies agree upon the compensation to be paid for the land occupied by such crossing, the court shall submit that question to a jury as provided in other cases for the appropriation of private property.”

The *right* to cross is separate and distinct from the “manner of crossing,” and if upon private property, the owner is entitled to compensation therefor. In the one case, the jury fixes the terms; in the other, the court. In addition to this right of compensation, there was no statute empowering the court to determine the “manner of crossing” when this contract was entered into, or of apportioning the cost of its construction and maintenance, as now under Section 8836, General Code. As far as the construction and maintenance of the crossing is concerned, the traction company was then wholly at the mercy of the railroad company. If this is so and they entered into an arrangement whereby the traction company acquired any right which it did not otherwise have, in consideration of a burden which it then assumed, it can not be said now that the contract here sued on was without consideration. In this behalf the second paragraph of the syllabus in *Judy v. Louderman*, 48 Ohio St., 562, is in point:

“While it is necessary that the consideration of a promise should be of some value, it is sufficient if it be such as could be valuable to the party promising; and the law will not enter into an inquiry as to the adequacy of the consideration, but will leave the parties to be the sole judges of the benefits to be derived from their contracts, unless the inadequacy of consideration is so gross as of itself to prove fraud or imposition.”

Holding these views, the demurrer will be sustained.

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Fort Loramie v. Gress et al.

SALE OF AN INTERURBAN ROAD FOR JUNK ENJOINED.

Common Pleas Court of Shelby County.

VILLAGE OF FORT LORAMIE V. C. P. GRESS ET AL.*

Decided, January Term, 1918.

Interurban Road—May Not be Abandoned, When—Owner of the Road Bound by the Terms of the Franchise—Where Owner is Not a Common Carrier, Organization of a Common Carrier Company to Operate the Road May be Required.

1. Operation of an interurban road, which is being run at a loss, may be abandoned and the road sold as junk so far as the charter granted to the company by the state is concerned; but a franchise agreement, entered into by the company with a municipality with a fixed period to run which has not yet expired, embodies contract rights which the company may not ignore and a court is without power to set aside.
2. A municipality which is a party to a franchise agreement with an interurban railway which has not yet expired may enjoin the sale of the road for junk and compel its continued operation.
3. Where the present owner of the road is a bank which has acquired the property of the company through ownership of its bonds, a court will require the bank to organize a company with common carrier powers and to commit operation of the road to such company.

Percy R. Taylor and *John Oldham*, for plaintiff.

H. T. Mathers and *Goeke, Anderson & Boesel*, for defendants, the First National Bank of New Bremen, Ohio, and the Western Ohio Railway Company.

BARNES, J. (orally).

This is an action of injunction, the petition being filed by the village of Fort Loramie against the defendants, C. P. Gress and the Western Ohio Railway Company. Gress, however, is a nominal defendant and we are dealing with the First National Bank of New Bremen, Ohio.

* Affirmed by the Court of Appeals, *Village of Fort Loramie v. Gress et al.*, 29 O. C. A., —.

The village of Fort Loramie, in their petition, complains of the defendant that they were intending to cease operation of the railroad known as the Minster & Loramie Railroad. This company was incorporated several years ago and operated a railroad from Minster to Fort Loramie. The First National Bank of New Bremen were bondholders of the railroad, and on two different occasions receivers were appointed for the railroad. The first receivership was adjusted in some way and the road continued its operation, with possibly a refinancing. After a time a receiver was appointed again and the road was sold to C. P. Gress, who represented the First National Bank of New Bremen, the First National Bank being the holder of the bonds and also some notes for money loaned the railroad company. Shortly after the bank purchased this railroad property they signified their intention, as the petition sets forth, that they intended to cease operation of the railroad. The petition sets forth further that they not only intended to cease operation of the road, but they intended to junk the road. The answer of the bank admits that they intended to cease operation, but denies that they intended to junk the road until they received an order so to do from the proper authority. The answer of the bank, in a cross-petition, asks for authority from the court to junk the road. The Western Ohio was also made a party defendant, but at the time of filing the original petition no injunctive order was sought against the Western Ohio, but subsequently a temporary restraining order was sought and granted, restraining the railroad company from ceasing operation under an operating contract originally entered into between the Minster & Loramie Railroad Company and the Western Ohio Railway Company.

It is the contention of the plaintiff in this case that by reason of the charter that was granted to the Minster & Loramie Railroad Company from the state, and also by reason of the franchise that was secured from the village of Fort Loramie, that thereby the railroad must continue to be operated and they have not the right to cease operation or to junk it.

The bank makes several defenses. They contend that, since the road does not pay operating expenses and interest on invest-

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ment, they should have the right to cease operation without any order of court. They also claim that if they have not a right to cease operation without an order of court, that a court of equity in this proceeding should grant them the right and give them an order to cease operation. The bank also contends that whatever the rights might be of the village of Fort Loramie against the Minster & Loramie Railroad Company if they are still operating, that those rights would not hold against the First National Bank of New Bremen. They claim that it would not hold against the bank for the reason that the bank is a national bank and therefore would not have the right to operate a railroad, and that any of the contractual relations that might have existed through a franchise or charter, would be *ultra vires* as to the bank. It is also contended that the contract between the Minster & Loramie Railroad Company and the Western Ohio Railway Company is not assignable and that the bank is not a successor or an assignee of the Minster & Loramie Railroad Company as to either contract, and for that reason that an order can not be made to continue the road, or the operation of the road; and, further, that for this and other reasons they should be granted the right to junk the road.

Taking the questions up in what seems to the court to be the logical order in investigating the matter, the first query comes as to what obligations rest on the Minster & Loramie Railroad Company. They procured a charter from the state under the then existing law of the state; they also procured a franchise from the village of Fort Loramie. Now, it is contended on behalf of the plaintiff that, under and by virtue of the charter obligations of the state, the railroad company must continue to operate its road and can not cease to operate unless it is authorized by some competent authority. In support of that proposition, one of the leading cases that is cited is 53 Connecticut, 833 (5 Atlantic Reporter, 695). There were also cited 92 Ohio State, page 1, and another case at page 9, and *Railway v. Hatchett*, 192 S. W., 694. These cases, except the Connecticut case, have to deal more particularly with regulations of railroads. There is no question that it is the law of this state that a railroad

company, when it receives charter rights from the state and builds a railroad under and by reason of those charter rights, is subject to the regulations and any existing law of the state that regulates a public service corporation, and this rule is true as to any public service corporation; if it operates it must subject itself to these rules and regulations so long as they are reasonable. If the state by the Legislature or any other body that power is delegated to, imposes unreasonable regulations on a public utility, such regulations as would in a measure confiscate the property of the public utility, a court may relieve the public utility from observing those regulations. In other words, a regulation can not confiscate property. These decisions that were cited by plaintiff attempting to show the obligation of the Loramie Company to operate this road hardly touch this question, except the Connecticut case, because they deal with regulations and this is not a question of regulation. The Connecticut case is based on the peculiar language of the law of that state. That is, they hold that by reason of the charter obligations existing under the law of that state, that a railroad company in that state can not cease operations even though they may be compelled to operate at a loss, and they cite decisions of other states and say that is the weight of authority in other jurisdictions than Connecticut. The contrary rule has been adhered to only in the states where the charter obligations are not such as to make it obligatory on a public service corporation to operate under any and all circumstances.

Now making investigation in Ohio as to what the rule would be here, I find that the Ohio courts have not followed the Connecticut rule, although in some decisions in Ohio they have referred to this Connecticut case. But when the question has been really before them they have not adhered to that rule. So that in Ohio there is probably no charter obligation that would compel the operation of a public utility regardless of whether it can be operated at a profit or not, and unquestionably none where a public utility can not operate except at a loss. The evidence in the case at bar shows that while the road could possibly pay operating expenses, it could pay no more than operating expenses;

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it could pay nothing to speak of as interest on the investment; it could not create any contingent fund to keep up repairs that are bound to be required in the future, and it could not be said it would not be a losing venture from an investment standpoint. So that, dealing with this question as to the charter obligations alone, I do not think that the plaintiff would be entitled to an order of injunction.

Now this brings us to the next proposition involved, and that is as to the franchise rights and obligations. The terms "franchise" and "charter" are used sometimes interchangeably; it is sometimes said the rights procured from the state are charter rights and sometimes they are spoken of as franchise rights; but in passing and speaking of these rights, when I speak of charter rights I refer to the rights procured from the state, and franchise rights as those procured from a municipality.

Now the Minster & Loramie Railroad Company procured a franchise from the village of Fort Loramie. The courts have held in this state that a franchise is a contract and that it is binding on all parties to it. The Legislature of this state, in Section 3771 and Section 9102 of the General Code, has enacted a very positive provision, that franchise rights granted by a municipality shall not be altered during the life of the franchise, which means that if the franchise is granted for any period of time the municipality can not, by subsequent legislation, relieve the public utility of the obligations that are imposed in the original ordinance granting the franchise, where that ordinance was accepted by the public utility, for the passage of the ordinance and the acceptance by the public utility constitutes a binding contract between the parties. In the ordinance in question, passed by the village of Fort Loramie, granting a franchise to the Minster & Loramie Railroad Company, the time was stipulated in the ordinance at twenty-five years. Now the question arises as to whether the time was material to the contract or was a material part of the contract. It might be construed as simply a designation of the time for which the public utility might exercise its rights under that ordinance, but in examining the authorities I think the rule is positively laid down in this state that the

time is material, and that where the ordinance granting the franchise stipulates a time, it is a binding obligation upon the public utility where it files its written acceptance, as was done in this case. The 81 Ohio State, 33 (*East Ohio Gas Company v. City of Akron*), is one of the first cases that dealt with this question; the first syllabus reads as follows:

“Where a corporation is formed ‘for the purpose of producing, purchasing and acquiring natural gas’ and ‘of piping and transporting natural gas from the place or places where it is produced, purchased or acquired’ to certain named towns and cities situated in the counties along the line of said company and between the termini thereof, ‘and to other cities, villages and places in the counties aforesaid,’ it is not one of the charter obligations of such corporation to furnish natural gas to consumers in all of such cities, towns and villages.”

And in the second syllabus:

“Where a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract, and the rights of the parties thereunder are to be determined by the contract itself.”

Now the question involved in that case was whether or not the gas company could cease to furnish gas to inhabitants in the city of Akron. Some ten years previous to the institution of the suit the gas company had commenced operation in the city of Akron under an ordinance that specified the term of ten years. At the expiration of the term of ten years the city council passed a new ordinance prescribing a lesser rate per thousand to be charged the consumers for gas. The gas company immediately gave notice that it would discontinue operations in the city of Akron, and an action was brought to prevent them from ceasing operations, and to compel them to continue to furnish gas and to furnish it at the rate prescribed in the new ordinance. The new ordinance was not accepted by the gas company. Now in

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this case, as it was brought and as it was considered by the court, arose the question as to the charter obligations, and the Supreme Court, in deciding the case, while holding that the charter provided for the furnishing of gas to numerous cities, naming them, and Akron was one of them, yet say that it was not a contract, and that it was separable, and the ten-year ordinance having expired there was no contract existing between the gas company and the city, and that by reason thereof the gas company had a right to retire from further operations in the city of Akron. So that a careful reading of the case will disclose that the question of time in the franchise is material matter and that it is a material and binding part of the contract.

Now it is urged that that was a different public utility from the one we are dealing with in the instant case; that the court might adopt a rule of that kind as to a natural gas company but it would not be a proper rule to adopt as to a railroad company. But in the case of *State v. Northern Ohio Traction Company*, decided in the 93 Ohio State, page 466, the court again deals with this same question and in a case relative to an interurban railway, and follows the decision in the 81 Ohio State. There is not a full opinion; the majority of the court only say, "Judgment for relator on authority of *The East Ohio Gas Company v. City of Akron*, 81 Ohio, 33." The judgment is by Nichols, Chief Justice, Johnson, Wanamaker and Matthias. Jones, Donahue and Newman dissent in an opinion written by Judge Jones. In that case the interurban railway company had a charter from the state, of course. They had obtained from the county commissioners through the counties where they operated, possibly one county, a consent or a franchise as it might be called. The term was not stated; no time was designated. The railroad company maintained that it was indefinite. The proceeding was in quo warranto. The prosecuting attorney, representing the state, maintained that, since no time was designated, it was a contract at will and that either party could terminate it whenever they saw fit. The statement of the case discloses that there was no difference or no disagreement or no complaint on the manner or method of operation except on the

question of rates, and the commissioners were insisting upon a rate that the railroad company was unwilling to agree to. It was argued that the question of rate was a matter that should be determined and handled by the public utilities commission and that it was not one of their charter obligations, but was purely a regulation. But the court renders their opinion on the authority of 81 Ohio State, the Akron case, and in effect say that since no time is designated, it is a contract at will. It was also argued, and it is shown in the dissenting opinion, that there wasn't any provision of law suggesting or requiring that county commissioners should grant rights or franchises for any designated period. There was a provision of law, of course, that arrangement must be made with the county commissioners when they cross highways, but no provision that county commissioners may grant rights for any specified time. But notwithstanding that, the court held the majority of the court at least, that no time being specified it was a contract at will. The decision of the circuit court in the same case is reported in 15 C.C.(N.S.), 577, a very full opinion, and the dissenting opinion in the Supreme Court is by Judge Jones and is very full.

If the majority of the courts did not hold otherwise I would be very glad in the present case to follow the circuit court decision and the dissenting opinion, for the reasoning appeals to me. But the Supreme Court, in this very recent case, having decided the matter otherwise, there is nothing that this court can do but follow that decision.

In Ohio thus far we have these two cases, the 81 Ohio State, where the public utility was desiring to withdraw from operation because there was no time stipulated, no franchise, and the case in the 93 Ohio State just referred to, in which the county commissioners, the opposite party, seeks to discontinue operation because there was no time stipulated. This leads us to investigate as to what the courts have held in railroad cases, where a time is stipulated in the franchise. In the case of *State of Ohio, ex rel, v. City of Dayton*, 11 C.C.(N.S.), page 263, Judges Sullivan, Wilson and Dustin, a proceeding in quo warranto, the railroad company had been operating in the city of Dayton for

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a number of years under a franchise. About the time that this franchise was to expire and negotiations were going on between the city and the railroad company as to a subsequent franchise, a new act of the Legislature was passed authorizing the city to grant franchises for fifty years. The language of the law at that time was that in renewals of franchises the contemplated action be taken before the expiration of the old franchise. In this case the delay was due to the fact that there was a difference between the railroad company and the city, and the ordinance of the council granting the renewal of the franchise was not passed until several months after the expiration of the original franchise. It was contended on the part of the state that the ordinance not being passed in time, that there was no valid ordinance, and they asked to have the railway company ousted. The court held that there was a valid ordinance and it is a valid ordinance for fifty years. And the court held that the ordinance was a contract and that the municipality was bound by it.

Now, in the case at bar, we have just a slightly different situation than in any of the three cases cited. In the case we are now hearing the railway company is seeking to cease operation and the village of Fort Loramie is seeking a mandatory order to compel them to continue operation. I am unable to find any case in Ohio where the question has come to the court in just that way. But reasoning from analogy and from those three cases that have been cited, I can not see how a court could come to any other conclusion than that the same order should be made in a case of this kind that was made in the three cases just referred to. In all three of those cases the court has held the rights of the parties to be controlled by their franchise; if there was no franchise they were not bound by their charter obligations; if the franchise had expired they could not be held; if there was no time mentioned in the franchise it was a contract at will. In this case the franchise says twenty-five years. Now that is a contract. The decisions hold that the contract obligations are binding on the municipality; if they are binding on the municipality they must be binding on the railroad company, because there must be mutuality in order to constitute a binding

contract; you can not bind one side and not bind the other; any provision of a contract that attempts to bind one side and not the other is not a part of the contract. So that, under that situation, the Minster & Loramie Railroad Company would be bound regardless of the question of whether or not it could operate at a profit, because having contracted so to do it must carry out its contract, and the court can not relieve it from an undesirable contract. It did not have to enter into it; it possibly entered into it with the idea that it would be profitable; but now that it proves unprofitable the court is powerless to grant any relief.

We thus far have been dealing with this question as though there had been no sale of this property to the bank. I might say further that counsel for the bank concedes that if there had not been a sale of this property to the bank, that it would be bound by this contract or franchise; that is, that the Minster & Loramie Railroad Company would be bound as provided in the ordinance. But it is contended that the bank is not a successor or an assignee of the railway company. It is also contended that the court can not order the bank to operate; because of it being chartered as a national bank it can not be ordered to operate a railroad company. Counsel upon both sides agree upon the proposition that the bank had the right to purchase the property since it was the owner of the bonds and that it was necessary to do so in order to protect its financial interests in the property; but the bank contends that since it has purchased the property and not being empowered to operate a railroad, that it must dispose of it to some one that can operate it, or junk it and get out of the railroad business. In his brief counsel for the bank cites numerous authorities that personal contracts are not assignable, and attempts to make the cases applicable to this situation. There is no question on the proposition that purely personal contracts are not assignable, but the very cases that are cited by counsel for the bank do say that contracts that are a lien or that run with the land are assignable. Now what is the situation here? This railroad company could not build a railroad at all except through its franchise right; it might have constructed a railroad

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outside of the village of Fort Loramie without any franchise right except such as would be procured from the county commissioners, and the county commissioners could have granted rights outside of the village of Fort Loramie in crossing public highways without designating any time, and thereby the contract would have been a contract at will. But that is not what was done. The railroad company procured the franchise from the village of Fort Loramie, and under section ten of that franchise it is provided, among other things, that they shall run cars and connect at Minster with the cars running over the Western Ohio Railway.

Now it is contended that the village of Fort Loramie had no authority to legislate beyond the limits of the municipality, and that anything that is in this ordinance that provides for regulation outside of the municipality would be null and void. This question I think has been decided by the Supreme Court in the case of *Interurban Railway & Terminal Company v. Cincinnati*. In that case the franchise was granted by the village of Pleasant Ridge, a village close to Cincinnati. It contains this provision: "Should the village of Pleasant Ridge be annexed to the city of Cincinnati, the rate of fare charged for a ride in either direction between any points in said village and the Cincinnati terminal shall not exceed five cents." Now this was a legislative act by the village of Pleasant Ridge providing for fare and a regulation beyond the limits of the village. It was argued in this case that the village had no authority to legislate beyond its limits and that that provision, while in the ordinance and while it was accepted by the railroad company, had no binding effect because the village had no authority to so enact. The court goes into that question in the dictum very fully and says that the railroad company had, however, a right to regulate and make provisions beyond the limits. And the court gives special attention to the fact that very frequently small villages have absolutely no use or no necessity for a railroad; that they only procure the right to go through them because they are in the line of the interurban railway; and that under the existing law they can not go through them without securing a franchise, and that the village, in grant-

ing the franchise, has the right to make stipulations and provisions that extend beyond the line of the railroad. So applying that principle and that reasoning to the case at bar, I take it that it is a matter of common knowledge at least to all of us here that the village of Fort Loramie had no use for a railway in the village itself, merely to operate in the village, if it did not connect at any other point.

Now if the Minster & Loramie Railroad Company desire to run their cars and operate in the village, they must procure a franchise; and they did procure the franchise in this case and in the franchise it was provided that they run cars to connect at Minster with cars run by the Western Ohio Railway Company. So that I think, from analogy, the court must find that this is a binding obligation in that franchise.

Now touching the other question, how can that bind the bank? Well, we have this situation. This franchise right was necessary before the railroad could build at all. It therefore certainly runs with the land; it is an obligation running with the land; it is a part of the property. They could not have constructed a railroad as they did and where they did except they had procured this franchise; not necessarily the franchise as it is worded, but some franchise. And since they accepted the franchise that was passed and obligated themselves for twenty-five years, they are bound by it. Now anybody dealing with a railroad company must necessarily know when it occupies a village street that it only does so by authority of its franchise; it can not occupy it otherwise; and every one then is chargeable with notice of the provisions of that franchise; they have the right and they have the opportunity to inquire and know just what those franchise provisions were, and if they loan money to, or buy the bonds of the railroad, they necessarily are secured only by the property that is owned by the railroad company; and the railroad company owns its property subject to this franchise, subject to this contract. So that when the bank bought the bonds of the railroad company they took no greater title than the railroad company had, and when a receiver was appointed and sold the property, he could sell nothing more than the railroad company

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could sell as an individual, just the same as where as execution is issued. If this property had been sold on execution, there could only have been sold the property the Minster & Loramie Railroad Company owned, and they owned this property subject to the franchise contract. Now it is said that because they are a bank that the obligations would not attach to them. That certainly can not be true, because it certainly can not be argued that the village of Fort Loramie would be deprived of their rights under this contract, simply because some one purchased the railroad who was not authorized to operate it. The village of Fort Loramie was not a party to that suit; none of their rights are passed on by virtue of that suit; they have all the rights under their contract now that they ever had. And just as the bank could buy the property for the purpose of protecting themselves, it must be considered that they bought it charged with all the obligations existing by virtue of this franchise contract. And the obligations of that franchise contract were to continue in operation for twenty-five years. So that when they purchased the property to protect themselves they could not cease to operate simply because they are a National Bank. Furthermore, a National Bank could not take advantage of the doctrine of *ultra vires* for their own benefit. Generally speaking, that question is raised by the government, or it may be raised by some stockholders against the officers of the bank creating the liabilities, but a bank can not relieve itself of undesirable obligations by simply setting up the question of *ultra vires*.

Now there is another question that is not raised in the briefs, but suggests itself to the court, viz., the bank is not a common carrier. It has not the right of eminent domain; that would be true of an individual, but simply because it is not a common carrier, it has not the right of eminent domain. The bank might be proceeded against in quo warranto, because it has not the right to operate.

A question occurred to the court as to whether or not this was a proper proceeding, due to the fact that this road was being operated by some one who had not the rights of a common carrier. But I find that question has been decided in *State v. To-*

ledo Railway Company, 3 C.C.(N.S.), page 285, where the court held that the case made was *ex contractu* or *quo warranto*. The state may bring the action in *quo warranto*, but the parties to the contract may bring the action *ex contractu*.

Now, relative to the application that is made by the railway company to junk, I think what the court has already said possibly answers that proposition. I do not think that the court, in any case, would have the right to issue an order and grant the right to cease operation unless there was some legislative authority for it. In cases where mere charter rights are involved, or mere regulations, reasonableness or unreasonableness of them—in no case that I have been able to find has the court ever granted an order to cease operation. The court may have granted an injunction against the order that was made because it was unreasonable and might confiscate the property. If the utility cease operation courts have been called upon to compel them to operate; and, where there is no franchise agreement for a definite period, courts have refused to give a mandatory order to compel operation; but I know of no case where a court has granted the right to cease operation. If there is no franchise contract requiring operation, then the utility can quit of its own volition; it does not require any court order so to do. Of course, the recent enactment of the Legislature in the 107, page 525, I believe it is, which requires application to be made to the utilities commission before a utility can cease operation would not apply, but even that would not be an application to the court, but an application to the public utilities commission. So that regardless of any other question that is involved in this case the court does not think, under any circumstances, it would have any authority to grant to any public utility the right to cease operation; if they have the right they have the right without an order of court.

A question also arose by reason of the contract—operating contract as we may term it—between the Minster & Loramie Railway Company and the Western Ohio Railway Company. There are no other parties to this contract than these two corporations. Under that operating contract I think there is no

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question that the Minster & Loramie Railway Company are the operators, and not the Western Ohio. The contract was not entered into for the benefit of the village of Fort Loramie and, consequently, it can not be said in law that they have any interest in the contract. By reason of that fact the court has no power to make any order in this proceeding against the Western Ohio Railway Company, and the temporary restraining order I have granted will be dissolved so far as the Western Ohio Railway Company is concerned. If this was a question wholly between the present owner of the Minster & Loramie Railroad Company and the Western Ohio Railway Company, the court is inclined to think, if that question was before it, that it would find that all the rights of the Minster & Loramie Railroad Company do now inure, or did at the time of the receiver's sale, to the present owner of the Minster & Loramie Railroad Company.

It is disclosed in the evidence that this contract is the means at present of operating the road; that the Minster & Loramie Railroad Company, or its present owner, has no means of operating the road at the present time except by its operating contract with the Western Ohio Railway Company; that if this contract between the Western Ohio and the Minster & Loramie Railroad Company were set aside, or by agreement between them it should be discontinued, the railroad could not be operated. Consequently, the court will order that the present owners of the Minster & Loramie Railroad Company do nothing to abrogate or set aside that contract, but that they do everything to keep it in full force and effect until they are prepared to find some other means of operating the road.

A question has come to the court's mind as to the means of enforcing an order of this kind, since the present owner of the railroad is not a common carrier. In the case of *State of Ohio v. Toledo Railway Company*, 3 C.C.(N.S.), 285, the court, on the last page of the decision, says that the court may mold the remedy to meet the exigencies of the case. And also I find in the 47 Federal, page 15, where Judge Brewer of the district court lays down the rule that a court of equity has almost any power to enforce and carry out its orders.

So, under the situation, the bank not being a common carrier, therefore not authorized or having the rights of eminent domain, and by reason thereof subject to a quo warranto proceeding, it will be the order of the court that the bank proceed to organize a company that will have the right of eminent domain so as to carry out all the provisions of this franchise contract; and on failure so to do the court will appoint a receiver to operate the road and to place it in the hands of a company having the right of eminent domain. Now the court does not want to put the company to the expense of a receiver, if this order can be carried out by the parties of their own volition; or if the parties desire to take this to the higher court, which I apprehend they will, I do not want to put them to any unnecessary trouble or expense, if some arrangements can be made pending the hearing in the higher court to preserve the rights of the parties.

The temporary injunction will be made perpetual as against the present owners of the Minster & Loramie Railroad Company, and the costs will be adjudged against the defendant. Appeal bond, \$200. The answer and cross-petition of the bank will be dismissed.

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**PROOF AS TO THE RIGHT OF A RAILWAY COMPANY OF
FOREIGN INCORPORATION TO EXERCISE THE
RIGHT OF EMINENT DOMAIN.**

Court of Common Pleas of Pike County.

JOHN W. BARGER ET AL V. THE CHESAPEAKE & OHIO NORTHERN

Decided, April 19, 1918.

RAILWAY COMPANY.*

*Eminent Domain—Proof Required to Establish Right of Company
Incorporated in Another State to Appropriate Property in this
State—Declaration of Necessity Jurisdictional.*

1. In an action by a railway company of foreign incorporation for appropriation of property in Ohio, a declaration of necessity by the board of directors is jurisdictional; and where the resolution setting fourth such necessity is not adopted by the board until after the appropriation proceedings have been begun, jurisdiction is not acquired and the proceeding must be dismissed.
2. In the absence of any evidence to the contrary necessity is sufficiently shown by the testimony of an officer of the rail way company to the effect that because of the wet and boggy nature of the ground between the points named it would be necessary for the company to widen its right-of-way in order to properly support its fill.
3. The right of a railway company incorporated under the laws of Kentucky to exercise the power of eminent domain is adequately established by reference to Carroll's statutes of Kentucky, together with testimony that this volume has been recognized by the Legislature of that state as containing the laws of the state and that private corporations are permitted to exercise the power of eminent domain in Kentucky.
4. Incorporation of a railway company in accordance with the laws of its domicile may be shown by record evidence.
5. That those whose names appear as stockholders are stockholders in good faith is shown by evidence that those claiming to be stockholders subscribed for stock and paid for it and certificates without limit or reserve were issued to them.
6. The election of a board of directors and organization of the board is adequately shown by the proffer of the minute book of the

*For opinion of the Court of Appeals in this case, see 28 O.C.A., 92.

company, after identification by its custodian, wherein these facts are set forth and which are corroborated by one of the directors who was present at the meeting and who says he knows that the minutes are correct and these acts took place.

7. Failure to agree with the owner of the land sought to be appropriated is shown by testimony to the effect that an offer was made by the company for the land and that it was rejected by the owner.

Robt. J. Odell, C. E. Blanchard and G. W. Rittenour, for John W. Barger et al.

Levi B. Moore and Bannon & Bannon, for C. & O. Northern Railway Co.

NEWBY, J.

The first contention presented to the court is that this court has no jurisdiction to determine the preliminary questions in this case.

The case originated in the Probate Court of Pike County and there resulted in favor of the corporation. The case was taken to the court of common pleas and the decision of the probate court affirmed. Error was prosecuted to the court of appeals where the decisions of the lower courts were reversed. And counsel claim that the statute, under those circumstances, requires that the new trial should take place in the court where the proceeding was begun.

I feel that this question has been determined for me by the judgment of the court of appeals remanding the case to the court of common pleas for further proceedings. The judgment remanding the case back to the common pleas court for further proceedings necessarily carried with it a determination by the court of appeals that this court had jurisdiction to hear the preliminary questions and to hear the case anew, and if that determination is erroneous the court of appeals, and not this court, is the one to correct the error. This finding is binding on me.

The court of appeals laid down what facts are necessary to be established by the corporation preliminary to taking the land and having the compensation assessed. They are stated as:

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First. That it was duly incorporated under the laws of the state where such incorporation was had when the hearing is had in a state other than that of its incorporation, and it must be proven as any other fact in the case.

Second. It must prove that its stockholders are real stockholders in good faith.

Third. That it has organized a board of directors, and that said board has organized.

Fourth. That it is a *de jure* corporation.

Fifth. That it has attempted to agree with the owner of the land as to the compensation and damages, and has failed to do so.

Sixth. That it was necessary to appropriate the land for the uses and for railroad purposes.

Seventh. That the road's directory has declared that it is necessary for the purposes of the road.

Eighth. That the power of eminent domain has been conferred upon it by the Kentucky laws.

In the report of the decision in the Ohio Law Reporter, what appears here as the seventh fact necessary to be established, is stated in the syllabus as the last and eighth, I believe, in number, the language being something like this: That it is necessary to appropriate the land for railroad purposes and that its board of directors have so declared.

Now, the most troublesome question in the case to me is the one arising upon that point in the decision of the court of appeals. The fact is that at the time this suit was instituted in the Probate Court of Pike County, the board of directors of the corporation had made no declaration by resolution or otherwise that this land was necessary for corporate purposes. Since then a resolution has been passed and was offered in evidence, the resolution having been passed, if I am not mistaken, as to the date, after the decision in the court of appeals, holding that such a declaration on the part of the railroad directory was necessary in order to complete the proceedings to condemn the land. Counsel for the railroad company claim that such a declaration is not jurisdictional, and if necessary may be made at any time before

the hearing so that the court may say upon the hearing that the necessary declaration has been made.

I have made a slight examination of the statute, not as complete as I would if the question had been a new one, to ascertain whether in the case of an appropriation proceeding by a private corporation any resolution or declaration on the part of the directors of the corporation was necessary. It is necessary in cases for a village council, in cases where the municipality purposes to condemn land, to pass a resolution of the necessity for the condemnation. But, in the hasty examination which I made of the statutes I did not find any similar requirement of a declaration of necessity by any one in case of a condemnation by a private corporation as this is. However, I did not make a thorough investigation, and if there is such a requirement by statute I overlooked it. But the court of appeals has decided that a declaration of necessity by the board of directors is necessary before the court shall proceed to assess the damages and permit an appropriation of the land for purposes of the corporation.

Rockel, in his work, gives a form of petition by a private corporation in which there is no allegation that the directors of the corporation have passed a resolution declaring necessity. In the discussion of that matter he says that it is usual for the directory to make such a declaration by resolution, and goes on to discuss the effect as evidence of such a resolution. He says the court must find that there is a necessity and the corporation may, by resolution, declare the necessity, but that such declaration is not binding upon the court, but if it has been made, it is *prima facie* evidence and raises the presumption that the condemnation is necessary until it is shown that the corporation has abused its power in that respect. But it seems to me that if a resolution of a board of directors is necessary (and that is what the court of appeals said, and that is what I must take as the law, the same as I did in reference to the remanding of this case for trial back to the court of common pleas), it would follow, I think, that such action on the part of the directors was jurisdictional and must precede the institution of the suit to condemn the land, because all the authorities lay it down that necessity

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for the appropriation is a jurisdictional fact. And, if in addition to necessity there must be a showing that there was a resolution passed by the board of directors declaring that necessity, is not that for the same reason a jurisdictional fact? If it is, you could no more omit it before the suit has been brought and supply it after the suit has been brought than you could omit any other jurisdictional fact; for instance, the organization of the corporation at the time the suit was brought or the inability to agree with the owner, and then show a complete organization of the corporation and attempt and inability to agree with the owner after the suit was brought. The jurisdiction must be complete at the beginning of the proceeding.

Now, that being the view that I take, this suit was prematurely brought. The court of appeals, I think, has so held, and for that reason the cause can not proceed further.

As I said in the beginning, this, to me, is the most troublesome question in the case. Upon the other questions I feel reasonably well satisfied that the company has shown the existence of necessary facts to authorize it to prosecute this proceeding. And while counsel did not ask for any finding of facts, and I don't know that they want any, but to get the question concretely presented to the court above, and possibly the whole question settled at once, I think I would be willing to make a finding of all the other facts necessary to be shown in favor of the company, but find as to this seventh requirement, as it is numbered here in this opinion before me, as not having been established because of the lack of the passage of the resolution by the board of directors before the institution of the proceeding in the probate court.

As to the matter of necessity we have the testimony, I don't recollect the name, of an officer of the company, that the ground was of such a character there that they needed a strip wider than they might need under other circumstances. The ground, he said, was inclined to be wet or boggy and that they might have to fill in and that they would have to have a strip as wide as they claim. In the absence of any showing to the contrary I am inclined to hold that that is proof of necessity, and added to that is the fact that the railroad is running over this land, and that,

of itself, is strong proof of the necessity for railroad purposes, that is, the necessity for some ground there. Whether it would be as wide a strip of land as they are demanding, the mere use of what they have would not prove. But we have in addition to that the testimony of Mr. Caples that it is necessary to take a strip of the width they have demanded to operate their road through that piece of territory properly, in view of the conditions there existing.

I haven't prepared myself as fully as I would on the other questions because it did not occur to me until coming down here that this might be a very good way to present the question clean cut to the court of appeals. Of course if I have construed their decision correctly there can be no condemnation or appropriation of property by a private corporation without a showing of necessity, and to use their language: "That the directory of the corporation has so declared."

The other facts to be proved are that it was duly incorporated under the laws of the state where such incorporation was had when the hearing is had in a state other than that of its incorporation, and it must be proven as any other fact in the case.

Without taking up and reviewing the testimony at any length on these questions, I think that the record evidence that was produced is sufficient to show that the company has been duly incorporated under the laws of Kentucky and that its stockholders are real stockholders in good faith. The only showing on that is, that the men subscribed for stock and paid for it and certificates without limit or reserve were issued to them, and I don't see any reason why the court could reach a conclusion, so far as there has been any showing here, that they were not real stockholders to the extent that they subscribed and paid for their stock. The testimony shows beyond dispute that the stock was paid for and presumably the money so paid went into the treasury of the company and is there yet. I can not say that it was ever drawn out, or that it was never turned in. The presumption is that it went the course it should have gone when a stockholder takes stock in a corporation and pays for it.

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Has it organized by electing a board of directors, and has said board organized, and is it a *de jure* corporation?

The testimony is uncontradicted that the board has organized; the directors testified to that fact. The minute book was offered in evidence, which the court of appeals held ought not to have been received by the court who heard this case before because it wasn't identified by any one who was the custodian of it. In this hearing here the assistant secretary, I believe he styles himself, says it is in his custody, and the book shows a complete organization of the corporation. In addition to that we have the testimony of one of the directors who was present at the meeting and signed the minutes as president of the board and says he knows that those acts took place, that the minutes were correct and that he signed them officially. And those records are found in minute books now in the possession of the present lawful custodian thereof. I think they are records of the corporation, and that it is a *de jure* corporation, and there is nothing to dispute them if we find that the stockholders are real stockholders and that they have organized by electing a board of directors and that the directors have organized.

Now, another question that was discussed at some length by counsel for the land owners is named here as fifth; that it (the corporation) has attempted to agree with the owner of the land as to the compensation and damages, and has failed to do so.

Mr. Moore testified that he opened negotiations at the request of some officer of the company with these land owners and that an amount of \$1,800 was agreed upon as a compensation for the land to be taken, and as I gathered from the testimony, it then appeared as if the proceeding in the probate court would be merely formal, but further on the land owners claiming that they had been led into that agreement by some misunderstanding as to the character of the company, whether a corporation or not, asked leave to withdraw their offer to accept the \$1,800, and that leave was granted to them and their acceptance of the offer was withdrawn. Now, it seems to me that it can't be denied that here was an attempt to agree with the owners. An attempt is

when there is a *bona fide* offer made by the corporation and refused by the land owner. The company is not required to make them a number of offers, not required to dicker with the land owners any further than to make a *bona fide* offer, because if one offer is not sufficient would two or three or four or five be sufficient? If not, what number of offers must the company make? It did make an offer here. That is clear. It wasn't accepted at the final outcome of the negotiations. It fell through, but I think it shows an attempt to agree with the owner, which attempt failed in the manner and for the reasons as I have stated as shown by the testimony.

That the power of eminent domain has been conferred upon it by the Kentucky laws.

That involves a consideration of the testimony as to what the Kentucky laws are. In other words, does the proof offered here show the Kentucky laws to be as claimed by the railroad company?

The court of appeals says that the laws of a foreign state or territory must be proved as any other fact in the case.

There are methods of proof by our own statute and a slightly different one, as I recall it, by the federal statute, but the authorities cited in Jones on Evidence seem to be uniform that those methods of proof are not exclusive. Any other lawful proof, that shows what the law of a sister state is, may establish the fact for a court in this state, but the existence of the Kentucky laws, I think, have been shown in conformity with the statute of this state. In Section 11498, General Code, it is provided:

"Printed copies of written law enacted by another state, a territory of the United States, or foreign government, proved or purporting to have been published by its authority, or *proved to be commonly admitted as evidence of the existing law in the courts or tribunals thereof*, respectively, on all occasions by the courts and officers of this state, shall be admitted as presumptive evidence of such law."

The language of that section is a little bit confusing and I think has misled counsel for the land owners in this case to the conclusion that it requires proof that the courts of this state have

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commonly admitted such laws as the true laws of the sister state or territory. If that were so it would be difficult to prove in Ohio a foreign law, because, I think you will all agree, that in the central part of the state, at least, it is not only not common, but it is very rare that we have occasion to prove what the law of a foreign state is, and consequently no foreign law is "commonly admitted" as evidence by the courts and officers of this state. I think what this statute means is just what the original section of Bates statute 5244 says plainly, which is now carried into the General Code as Section 11498. That section (5244) provides as follows:

"Printed copies of written law enacted by any other state, a territory, or a foreign government, purporting or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such state, territory, or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such law."

In meaning, exactly the same language is used in the two sections, but in the present section some of the words are transposed, but it does not mean or necessarily bear the construction that to prove in the courts of this state a foreign law, it must appear that the laws of the state or territory whose law is to be proved respectively, on all occasions, have been admitted by the courts and officers of this state as presumptive evidence of such law. I say the terms have been transposed, yet I think they mean the same thing. That if the law has been shown to have been used and admitted as the law in the territory or state whose law is being proved, respectively, on all occasions, then the courts of this state and the officers of this state shall admit the law as presumptive evidence of such law.

The proof is not sufficient that Carroll's Statutes of Kentucky, which provide for corporations and granting them the right of eminent domain, was published by authority, but we have the testimony of a Kentucky lawyer who testified that he was practicing in the state of Kentucky and is conversant with the procedure in the courts of Kentucky and that those statutes were used in the state of Kentucky as the laws of that state, although

they do not themselves purport to be published by authority. It is shown, however, that at some session of the Legislature following the publication of Carroll's statutes the Legislature amended certain sections of Carroll's statutes, thereby recognizing, so far as the Legislature was concerned, that the Carroll statutes stood as laws of Kentucky. That is a significant fact, and while I have found no authority to the effect that the treatment by the Legislature of a publication of laws should be considered as proof that those laws, so treated, were valid laws, yet it does seem to me that it is a strong circumstance and ought to be given as much weight as the use by the courts of those statutes. The Legislature is presumed to know what the laws of the state are as well as the courts, and if the court used a certain set of statutes, Carroll's statutes for instance, as embodying the laws of the state of Kentucky, and such use is laid down by the authorities as proof of the validity of that publication as the laws of the state, why isn't there just the same reason to say that legislative recognition of Carroll's statutes as containing the laws of Kentucky by amending certain sections appearing in Carroll's statutes, is also proof equally as strong as that of the use of Carroll's statutes by the court as evidence that Carroll's statutes do contain the law of the state of Kentucky? Mr. Deiderick testified further that he had been present in the courts of Kentucky where private corporations were permitted to exercise the right of eminent domain under the authority of the law of that state, and so I conclude that this corporation has been duly incorporated under the laws of Kentucky and that under those laws the company possesses the right of eminent domain and may appropriate this land, the other preliminary matters being shown.

And another matter in regard to proof of statutes of another state is the attachment of the seal of the state to what purports to be a copy of the law. It is not necessary, so Jones says in his work on Evidence, that an officer, like a recorder of deeds, should certify that he is the custodian of the record and that he has compared the certified copy with the original record, but the mere fact of attaching the seal is sufficient proof of the validity of the law bearing the seal. In his work on evidence Jones quotes

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authorities construing the federal statute, and announces the conclusion I have just stated, that the seal itself, its presence upon a copy of what purports to be a copy of the law, gives verity to the copy bearing the seal and furnishes presumptive evidence that the law bearing the seal is the law of the state of the seal.

You may draw a finding of facts in favor of the company on all grounds except on that one, and that is that the directory has not declared the necessity for taking this land, and for that reason the proceeding is dismissed.

**VALIDITY OF ORDINANCE PROVIDING FOR LICENSING
MOTOR VEHICLES.**

Court of Common Pleas of Brown County.

CYRUS WATSON V. VILLAGE OF RIPLEY.

Decided, June 15, 1917.

Municipal Corporations—Authority to License Motor Vehicles Used for Hire—Invalidity of Ordinances Which Are Not Regulatory But Nothing More Than a Tax Under the Guise of a License.

A municipality has power to regulate and license the use of its streets by motor vehicles used for hire, but the license is an incident to the right to regulate, and the fee charged must be reasonably proportionate to the expense incurred in issuing the license and for police supervision; from which it follows that an ordinance which provides, in addition to a charge of one dollar, a further charge of \$25 for licensing motor vehicles used for hire, which fee is to be used in repairing the streets, is not regulatory, and the fee so imposed is not a tax, and the provision for its collection is void.

J. W. Bagby, for plaintiff in error.

E. R. Young, contra.

CLEVENGER, J.

This cause comes into this court on a petition in error from a judgment and finding of the mayor of Ripley, Ohio. The proceeding was a prosecution instituted against plaintiff in error for the alleged violation of a village ordinance. The original ordinance was passed by the council of said village, December 14, 1916, but on January 11, 1917, Section 2 of said ordinance was amended. It was for the alleged violation of this ordinance, as amended, that plaintiff in error was arrested and convicted by said mayor.

Counsel on both sides united in stating to the court that they were anxious for a decision on the broad question of the right of a municipality to pass such an ordinance, and asked the court not to dispose of the petition in error on some other ground.

The ordinance in question, and said amendment thereto, was adopted under the alleged authority of Sections 3632 and 3675, G. C. Section 1 of the ordinance reads as follows:

“That every person owning a vehicle or motor vehicle used for the transportation of persons or property for hire is hereby required to take out a license therefor.”

Section 2 provides the fee to be paid for such license, and under the heading (b) says: “For motor vehicle or motor vehicles, \$50.00.”

Section 3 provides that said license shall be taken out by the year; shall be issued by the mayor on application therefor, and that the mayor shall be entitled to a fee of \$1.00 for each license so issued, but does not provide that said fee shall be paid out of the money so obtained.

Section 4 provides that all moneys and receipts derived from the enforcement of the ordinance shall be credited to a fund known as the public service street repair fund, and shall be used for the sole purpose of repairing streets, etc.

Section 5 provides a penalty of not less than \$5, nor more than \$50, for violation of the ordinance.

The amendment of the ordinance changed Sec. 2 so that the fee “for motor vehicle” should be \$25, and each additional

motor vehicle \$5. One of the questions raised at the trial and preserved in the record is the validity of said ordinance in its original form and as amended.

The question is one not squarely decided in Ohio. In the act of April 2, 1906 (98 O. L., 320), Section 19 expressly prohibited a municipality from passing any such ordinance, and decisions based upon that act are not authority now so far as they relate to the question at bar. This act was repealed and re-enacted in an amended form May 9, 1908 (99 O. L., 538), and said Section 19 eliminated therefrom, and no such prohibition has been in the statutes from that time until the present.

The sections of the statutes under which the authority to pass this ordinance is claimed read as follows:

“Section 3632. To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railways cars within the corporation.”

“Section 3675. To license the owners of vehicles used for the transportation of persons or property, for hire, and all undertakers and owners of hearses, but the owners of such vehicle may be made liable for the breach of any ordinance regulating the conduct of the drivers thereof. All moneys and receipts, in any municipal corporation, which are derived from the enforcement of any ordinance or law requiring the payment of a vehicle license fee, shall be credited and paid into a separate fund, which fund shall be known as the public service street repair fund. All moneys and receipts so credited to such fund shall be used for the sole purpose of repairing streets, avenues, alleys and lanes within such municipal corporation.”

These sections occur in the “Enumerated Powers” delegated to municipalities by the Legislature. Section 3632 confers primarily regulatory powers; both sections contain authority to

license, and they must be construed in the light of the power intended to be thus delegated. It will be noted that in neither section is there any reference to a power to tax being delegated. It is plain that the Legislature intended to confer the power to license as an incident to the power to regulate.

In so far as the state has regulated the operation of motor vehicles in municipalities, it is obvious that the local authorities could not pass an ordinance contravening such regulation, but the state has wisely left a large part of the regulation of the use and operation of motor vehicles on the streets of the municipalities of the state to the local authorities. The state has delegated no authority to license vehicles, except such as are used for hire within the municipality, or to solicit or transact business on the streets. The ordinance in question does not offend in this respect, as it limits the license to those vehicles used for hire.

In *Crane v. Middletown*, 21 C.C.(N.S.) 173, the court of appeals, in discussing the question whether the general laws regulating the operation of motor vehicles have withdrawn the power from a municipality to regulate in any manner, say:

"This clearly would not be the case in regard to a proper municipal ordinance under Section 3632, requiring a license for the use of automobiles kept for hire or delivery purposes."

The Supreme Court, in *Frisbie v. Columbus*, 80 Ohio St., 686, 690, say that it is not necessary to determine whether municipalities, under the statutes as they exist since the act of May 9, 1908 (99 O. L., 538), may regulate and license automobiles. The above comment of the court of appeals in *Crane v. Middletown*, *supra*, is the nearest to an authority on the subject I have found in Ohio.

Going back to a consideration of the general principles underlying the enactment of these statutes, it seems clear the Legislature recognized that in order to make the power to regulate effectual, so far as it applied to those who made a business of occupying the streets of a municipality, some power must be delegated to enable the proper authorities to keep a list of such

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persons, and the character and kind of vehicles that were thus to be used. No such regulation could be made really effective without a power to license, which is nothing more than a requirement that one who thus desires to use the public streets must go to the proper municipal officer, state his intentions, give a description of the kind of a vehicle he intends to use, and get a permit therefor. A license is nothing more than written evidence of these facts. The law further recognizes the fact that such municipality should not be required to keep such records and issue such documents of authority and pay the expenses thereof out of funds raised by taxation for other purposes, as such permit relates only to the right of an individual to carry on his private business on the public streets, and has, therefore, given such municipality power to require the person so desiring to carry on his private business on the public streets to pay the expense of keeping such records and granting such permit together with police supervision, which is termed a license fee. In Ohio, at least, municipalities are given no further powers in respect of licensing vehicles that so occupy the streets. No authority to tax has been granted, and it would be of doubtful constitutionality if such authority were attempted to be granted.

Having decided that municipalities have the right to so license as an incident to the right to regulate, let us examine the ordinance in question and see if it falls under the definition given.

The ordinance does not purport to be a regulatory measure in any particular. It does not specify a single rule that the operators of motor vehicles must observe in the use of the streets. It does not provide for the expense of issuing the license being taken out of the money received therefor, but requires that all the money and receipts derived from the enforcement of the ordinance shall be used for the repair of the streets. It is perfectly apparent that the intention in passing the ordinance was not to regulate the use of vehicles on the streets of the municipality, but to provide a new source of revenue for the repair of the streets. The original ordinance has a

flat license fee of \$50 per year. The amendment changes this to \$25 for one and \$5 for each additional vehicle. In either instance it is clear that it was intended as a revenue measure. It is nothing more than a tax under the guise of a license. Such license fee to be valid must be reasonably proportionate in amount to the expense incurred in keeping such records and issuing such document and police supervision. The fee of \$1 to be paid the officer who does all the work and keeps the record would suggest the idea that a fee to be reasonably proportionate to the expense could not be far above that sum.

The ordinance herein construed is quite different from the instance of a "jitney bus" line that occupies the streets like a street railroad, making regular trips over stated streets. Many requirements might be attached to the latter that would be unreasonable to attach to the former.

My conclusions are that under the laws of Ohio a municipality has the right to regulate and license the use of its streets by motor vehicles for hire, but that the license is an incident to the right to regulate, and the fee charged must be reasonably proportionate to the expense incurred in issuing the license and the police supervision; that the ordinance in question is not a regulatory ordinance at all, and the license required is nothing more than a tax, and, therefore, the ordinance in so far as it relates to motor vehicles is void. The judgment of the mayor's court will be reversed with costs.

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**PROCEEDINGS TO DETERMINE TITLE TO PROPERTY TAKEN
ON EXECUTION.**

Common Pleas Court of Montgomery County.

STATE, EX REL LEONA SONNANSTINE, v. HOMER Z. BOSTICK,
JUSTICE OF THE PEACE.

Decided, January Term, 1918.

*Execution—Property Levied Upon Claimed by a Third Person—De-
termination of Title—Three-Fourths Jury Law Not Applicable—
Remedy—Justice of the Peace May Not be Compelled by Mandamus
to Enter Judgment in Such a Case.*

1. The three-fourths jury law is not applicable to an action before a justice of the peace involving the right of property.
2. Mandamus is not the appropriate remedy to compel a justice of the peace to render judgment upon a verdict returned before him.

Joy H. Hunt, for the plaintiff.

C. E. Blanchard, contra.

KINKEAD, J.

This action is brought to require the defendant, as justice of the peace, to render judgment upon what is claimed to have been a legal verdict in proceedings in the trial of right of property, under General Code, Section 11742. Under an execution issued in *Midland Grocery Company v. Tootle*, the sheriff levied upon an automobile alleged to have been owned by the relator. The defendant, as justice, summoned five jurors, who after deliberation returned with a verdict signed by only four men. The justice instructed them to retire for further consideration, and that the verdict should be unanimous. They returned and the foreman stated that they all could not agree upon a verdict. The verdict signed by the four was lodged with the justice, and is among the papers now before the court. All of the jurors gave testimony—the four who signed the verdict, that it was their verdict, while the fifth, the foreman, stated that it was not his

verdict. The cause was continued, and a new jury was summoned, whereupon proceeding was brought to test the question. It is claimed by defendant that this is not the proper remedy, but that error should have been prosecuted.

The question is whether under an act passed February 6th, 1913, 103 O. L., 13, relative to three-fourths jury applies to this kind of proceeding.

The character of this proceeding must first be determined before either the propriety of the remedy pursued herein, or the applicability of the amended jury law, can be decided.

Section 10223, General Code, provides: Unless otherwise directed by law, the jurisdiction of justices of the peace in *civil* cases, is limited to the township wherein they reside.

Other statutes confer jurisdiction in particular matters, such as solemnization of marriages, acknowledgments, in forcible entry and detainer, attachments, garnishment over non-resident, etc. Sections 10224 and 10225.

Justices of the peace are given—

“Exclusive original jurisdiction in *civil actions* for the recovery of sums not exceeding one hundred dollars,” etc. General Code, Section 10226.

Exclusive jurisdiction is given in replevin (Section 10230) and in certain actions in which the title to real estate may be drawn in question, trespass, proportion of expense in obtaining evidence in surveys to fix corners or settle boundary lines, Section 10231.

Provision is made for the commencement of actions, summons, service, etc., Section 10233, for an order of attachment “in a civil action before a justice,” Section 10253 and garnishment therein.

“In all cases before a justice,” a bill of particulars of the demand is to be filed (Section 10303), which must state the cause of action, Section 10304. Detailed provision is made for the trial of civil actions, for a jury, verdict, and the usual matters pertaining to the same, for judgment, appeals, etc.

Section 10382 provides:

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"In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of a justice of the peace, etc."

Special provision is made for procedure in forcible entry and detainer, Section 10447 *et seq.*, for replevin, Section 10462, without special designation as to the nature or character of such cases. But of course they are civil cases or actions.

The proceeding authorized by Sections 11741, 11742, 11743 is a civil proceeding for the trial of the right of property upon which a levy of execution from a court of record has been made. It is not a civil action in the same sense as are actions, or civil actions, provided for by the statutes prescribing the jurisdiction of justices. When ownership of the property is claimed by one other than the execution defendant, the execution officer is required to give written notice to a justice of the peace, setting forth the names of plaintiff and defendant, and a schedule of the property.

It is then made the duty of the justice to immediately make an entry on his docket, and issue a summons, directed to the sheriff or any constable of the county, commanding him to summon five disinterested men, electors, to appear to try and determine the claimant's right of property.

The justice is required to enter the receipt of the notice and schedule, and to make an entry on his docket. He must then issue a summons directed to the sheriff or a constable for five disinterested men, who are electors, to try and determine the claimant's right to the property in controversy. The claimant is required to give two days notice of the trial to the party in whose favor the execution was issued.

"If the jury finds that the right to the goods and chattels, in whole or in part, is in the claimant, they also shall find the value thereof, and the justice shall render judgment upon such finding for the claimant, that he recover his costs against the plaintiff in execution, * * * and also have restitution of the goods and chattels, * * * according to the finding of the jury," etc.

If the jury fails to agree, costs are taxed, and another jury shall be summoned as before.

This is what may be appropriately designated as a civil case or proceeding; it is not a civil action according to the ordinary acceptance of that term. A civil action in the justice court prescribed by statute is analogous to the common law civil action, commenced in the same way, and attended with the same procedural incidents. In such actions the function of the justice and the jury are like those of a court of general jurisdiction.

This proceeding to try the right of property is not like the civil action; it is not commenced in the same way, no summons is issued to the parties. The claimant does not immediately commence the proceeding before the justice, this being done by the execution officer. Notice of the hearing by the jury is given by the claimant.

The precise nature of the proceeding must be first determined in order to decide whether the remedy in mandamus is appropriate as well as whether the three-fourths jury law applies. It was treated as a statutory remedy in *Petty v. Mansfield*, 8 O. S., 369. And it was considered that the party was concluded or bound by it, so far as the officer is concerned. *Id.* If he pursues this method and fail to establish this right, he may not be allowed in a subsequent proceeding against the officer to show his right to it. *Abbey v. Searls*, 4 O. S., 598, *Ralston v. Ousler*, 12 O. S., 105.

A justice of the peace is given jurisdiction in "criminal cases" as provided by statute, Section 13422.

An appeal can be taken in civil cases tried to a jury when more than twenty dollars is claimed, Section 10354. But no appeal can be allowed in trials of the right of property under the statute either levied upon by execution or attached, Section 10396.

An order made by a justice of the peace may be heard on error by the court of common pleas, Section 12241; *Abbey v. Searls*, 4 O. S., 598, and *Jones v. Wilson*, 16 O. S., 420, are cases where error was prosecuted.

Section 10350 as amended, 103 O. L., 13, provides that in all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number. Section 10350 is part of the chapter relating to "Trial, and its Incidents" before justices of the peace.

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Sections 11741-11743 is part of the Civil Code, and apply to cases of execution where the sheriff is executing the process. Section 10371-10373 applies to executions made by the constables in justices' courts. The fact that Sections 11741-11743, under which this proceeding was had, is part of the Civil Code of Procedure applicable to the common pleas court, and that there are separate sections applicable to justices' courts, demonstrates that it is to be regarded as a statutory proceeding in which power is conferred upon a justice of the peace to issue a summons, impanel a jury and enter judgment upon its verdict. It is not a civil action or civil case such as contemplated by Section 10350 of the justices' code, wherein it is now provided that a three-fourths verdict may be rendered by a jury.

It must be concluded also that mandamus is not the appropriate remedy in view of the provision made that any order made by a justice of the peace may be reversed by the common pleas court. Section 12241.

The finding and judgment is against the relator and in favor of defendant.

MISJOINDER IN AN ACTION FOR LEGAL SERVICES.

Common Pleas Court of Hamilton County.

JAMES N. RAMSEY V. MARGARETTA DEITZ ET AL.

Decided, November, 1916.

Misjoinder of Parties Defendant and of Causes of Action—Where the Causes Arise on Different Rights and are Triable in Different Tribunals.

A cause of action for legal services can not be joined against an individual and also against the same defendant as administrator, nor can either of such causes of action be joined with one against a corporation, where the said causes do not all affect all the parties to the action and are triable in different tribunals.

Frank H. Kunkel, for demurrers.

Charles W. Baker, contra.

GEOGHEGAN, J.

Heard on demurrer to the petition.

The action is on an account for legal services alleged to have been rendered by plaintiff to the defendants, Margaretta Deitz and Louis E. Deitz individually and as administrators of the estate of Conrad Deitz, deceased, who died June 26, 1906, and the Boss Washing Machine Company, a corporation under the laws of the state of Ohio. The account consists of numerous items running from January, 1897, to January, 1912.

Separate demurrers were filed by each of the defendants setting forth a number of grounds, but for the purposes of this decision, only three need be considered:

First, that there is a misjoinder of parties defendant.

Secondly, that several causes of action are improperly joined.

Third, that separate causes of action against several defendants are improperly joined.

I have not considered the other grounds of demurrer which raise the question of the statute of limitations, the sufficiency of the petition, and the jurisdiction of the court over the subject-matter for the reason that in the view I have taken of this matter these questions can be raised and properly determined, upon the filing of an amended petition or petitions, if plaintiff desires so to do. The decision upon the grounds of demurrer which I have considered are based upon an examination of the allegations of the petition, together with the items of the account which is attached to the petition as an exhibit, and by specific allegation made a part thereof. Whatever question there may have been with reference to the right of a court to consider an account attached to a petition and made a part thereof for the purpose of determining whether or not a demurrer will lie against the petition upon any ground, has been finally settled by our Supreme Court in the case of *Forge v. Supply Company*, 82 Ohio St., 199, wherein it is specifically held that an account which is sued upon and attached to the petition and specifically made a part thereof, is a part of the petition, and that the items of such an account constitute a part of the cause of action; otherwise the allegations of

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the petition would simply constitute legal conclusions and would be of no force. (See language of the court at page 204.)

An examination of this account shows that part of the services were rendered to Conrad Deitz, the decedent, part to Margaretta Deitz and Louis Deitz individually, part to the same defendants as administrators of the estate of Conrad Deitz, deceased, and part to the Boss Washing Company, a corporation under the laws of the state of Ohio.

It is manifest from the mere statement that there are separate causes of action set forth in the petition. Whatever charges may have been incurred in connection with the business of Conrad Deitz, deceased, either by express or implied agreement, they are proper charges against his estate. Whatever charges may have been incurred by his administrators are charges against them individually, and whatever charges may have been incurred by the individuals and the corporation as such, are separate charges against them and the corporation. The administrators can not be held individually in the same action as they are sought to be held as administrators, in the one case, for this would result, if it could be carried out, in two judgments, one against them *de bonis testatoris*, and the other *de bonis propriis*. *Watson v. Dickey*, Tappan, 235; *Thomas, Administrator, v. Moore*, 52 Ohio St., 200; *Kittredge v. Miller*, 19 W. L. B., 119; *McBride v. Rucker*, 5 C. C., 12; *Fleischman v. Shoemaker*, 2 C. C., 152; *Deschler v. Franklin, Administrator*, 20 C. C., 56.

As it is true that the administrators can not be joined as such and as individuals in the same action wherein the causes of action set out against each is separate, it is certainly true that the separate causes of action against them can not be joined. Nor can a cause of action against the individuals be joined with a cause of action against the estate of decedent and a cause of action against the corporate defendant, unless there are some allegations in the petition tending to show that there was a general liability created and that all the parties assumed the same liability. There is nothing in this petition to show that the charges as made against the individuals have anything to do with the charges as made against the estate or the corporate defendant.

Swan on Practice and Precedents, Vol. 1, page 30, lays down the rule as follows:

“It is well settled, that causes arising in different rights, can not be joined in the same action. Thus, a count on a promise by husband and wife, can not be joined with a count by the wife *dum sola*; nor can trespass by husband for the battery of both, nor trespass for a personal injury to the wife and a cause of action for which the husband alone might sue, as the loss for her company; nor can trespass for the goods of wife taken before coverture, and the goods of husband taken afterwards be joined in the same action. So, a man can not join an action in his own right and as executor or administrator, nor can he have an action against another to charge him as executor or administrator and also in his own right, the judgment in the one case being *de bonis testatoris*, and in the other *de bonis propriis*.”

For the same reasons a man can not join a cause of action against an individual for legal services with a cause of action against an administrator of an estate for legal services rendered the decedent, nor can he join a cause of action against either of these with a cause of action against a corporation. His rights may necessarily arise by reason of separate contracts not having any connection with each other and not affecting all parties to the action. The right to unite several causes of action against several defendants is limited by Section 11307, General Code, which provides as follows:

“The causes of action so united must not require different places of trial, and, except as otherwise provided, must affect all the parties to the action.”

Claims against the administrators, arising out of their acts, must be presented to the probate court for allowance, and if disallowed an appeal can be taken. Claims against individuals and against corporations for legal services may be commenced in any court of competent jurisdiction; not in the probate court which has no jurisdiction over such matters.

It therefore seems that this petition is an attempt to join four separate causes of action against four separate classes of defendants, which said causes of actions do not affect all the parties to the action, and some of which require different places of trial.

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For these reasons, therefore, the demurrers will be sustained as to the three grounds set forth above.

If there is any merit in the other ground of the demurrer, and there seems to be on the pleading as it is now before the court, that question may be determined upon the filing of an amended petition or petitions which the plaintiff in his good judgment may see fit to file.

TRUANCY OF A CHILD OF A CONSCIENTIOUS OBJECTOR.

Common Pleas Court of Logan County.

TROYER V. STATE.

Decided, June, 1918.

Construction of the Truancy Statute—Attendance at School means "Attendance" in Good Faith and Compliance with the Reasonable Rules of the School and Participation in the Exercises Provided by the School Authorities.

1. The statute providing for criminal proceedings against a parent or other custodian, in the event of the truancy of a child under his care, contemplates, not that the child be merely sent to the school house or school room for the purpose of being sent away for refusal to obey, but that the child shall attend and obey and participate in the reasonable exercises provided for the pupils by those in charge of the school, and the statute is not satisfied by the mere appearance at school by a pupil who has been instructed by the custodian to disobey, and refuses to participate in the exercises.
2. A "conscientious objector" who has been convicted a second time for failing to cause his child to attend school, by sending the child to school with the instruction not to participate in patriotic exercises provided for the pupils, including a salute to the flag, knowing the child would be sent from the school room, and the instruction was carried out, will not be saved by a reviewing court from the pains and penalties of the statute pronounced upon him by the court below.

HOVER, J.

Ora Troyer was arrested on an affidavit filed by H. M. Black, truant officer for the village of West Liberty, Logan county, Ohio, in the court of Hon. John C. Rock, mayor of said village of West Liberty, Ohio, charging that the defendant below, on

the 13th and 14th days of May, 1918, failed, neglected and refused to cause Ruth Troyer, a nine-year-old child in his care and custody, to attend school.

The record further discloses that prior to the date above given, said Troyer was arrested on the same charge, pleaded guilty and was fined; that he paid the fine and costs. Defendant below was, therefore, charged in this instance with having violated the statute, after a former conviction, as a second offense. Trial was had and defendant was convicted and sentenced to imprisonment for twenty-five days in the jail of the county.

Error is prosecuted on seven assignments. The assignment of error relied upon is the fifth, to-wit, that said plaintiff in error was found guilty, when he should have been acquitted.

The record discloses that plaintiff in error is of the Mennonite faith and is opposed to defending his country in time of war; that the child, Ruth Troyer, is a girl about nine years of age; that there is an orphanage in the village of West Liberty, conducted and maintained by said Mennonite church and that a school room is provided in the orphanage; that the school board of said village furnishes a teacher and public school is conducted in the said Children's Home.

The record further discloses that plaintiff in error moved his family into the orphanage on the 5th day of April, 1918, and occupied rooms just across the hall from the school room; that certain patriotic teachings and exercises were required by Mr. Stanley, superintendent of schools of West Liberty; that Miss Edna Cook, the teacher in the orphanage, faithfully endeavored to execute the superintendent's orders; that the exercise contained in it certain words known as the pledge of allegiance and a physical salute to the flag.

On the trial of the first offense, it appears that defendant below kept the child away from the school room, but after having pleaded guilty and paid the fine, he instructed the child to go to school in the morning, and if she was sent out of the room by the teacher for refusing to obey the rule as to the exercises, to stay out until after the noon recess and then go to school again. The child went to school in the morning, would refuse to obey the rule, would be sent out by the teacher, she would

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return to school after the noon recess, refuse to obey the rule, and would be sent out again. This continued constantly from the time of the first arrest until the time of the arrest in this case.

It is urged by counsel for plaintiff in error that he sent the child to school and that, having sent her, he is not amenable to the law for the child's having refused to obey the rule as to the exercises.

Section 7773, General Code, provides:

"On the request of the superintendent of schools or the board of education, or when it otherwise comes to his notice, the truant officer shall examine into any case of truancy within his district, and warn the truant and his parents, guardian or other person in charge, in writing, of the final consequence of truancy if persisted in. When any child between the age of 8 and 15 years, or between the ages of 15 and 16 years, in violation of the provisions of this chapter, is not regularly employed and is not attending school, the truant officer shall notify the parent, guardian or other person in charge of such child, of the fact and require such parent, guardian or other person in charge, *to cause the child to attend some recognized school within two days from the date of the notice*, and it shall be the duty of the parent, guardian or other person in charge of the child *so to cause its attendance* at some recognized school. Upon failure to do so, the truant officer shall make complaint against the parent, guardian or other person in charge of the child, in any court of competent jurisdiction in the city, village or rural district in which the offense occurred for such failure."

E.

The statute is not complied with when a parent or other person having the care and custody of a child within the school age, sends it to the school house or school room. The law is that such person "cause the child to attend school."

Why the truant law, and the requirements of adults having the care of children to cause them to "attend school?" The only answer is that they, the children, may escape illiteracy, and that they may receive education.

This case is one where the child was trying to serve two masters. She says Mr. Troyer told her not to saulte the flag. This question was asked the child: "What did your father say, if anything, about saluting the flag?" Answer: "He said I should not."

This court believes that statement of the little girl, as no doubt the court below believed her; and, that being true, she was put in fear by the command at home, and, as between the two masters, chose to be sent, harmless in the corporal sense, from the school room. It would require a strange process of reasoning to condemn a child as incorrigible under such circumstances.

What would have been the result had plaintiff in error instructed the child to salute the flag and to participate in the school exercises? There can be but one answer. What would have been the result had the little girl received no instruction on this point from defendant below? Every one knows that the result would have been cheerful compliance. There is no instinct in the heart of the native-born American child to show disrespect, disloyalty and rebellion against the beautiful banner which symbolizes American independence, its free institutions and the glory of this great nation. The child was told by defendant below not to salute the flag in the school exercise, which exercise was required by proper officials of one of the best of our free institutions, the public school, and this instruction was given by the foster father in the time of war, at a time when the rich blood of the free men is being shed, that our nation may remain free and its institutions may be preserved; and to manifest this spirit of rebellion, the child was deprived of its right to attend school and receive proper instruction and education.

Such conduct on the part of our citizens is not conscionable, for conscience would lead to respect for government and to its defense, especially in time of war, but rather it is the forerunner of disloyalty and treason. All true Americans are conscientiously opposed to war, but when war is upon us, we will fight and fight until the victory over our enemy is won.

The court finds no error in the proceedings below, and the petition in error is dismissed at the costs of the plaintiff in error, and the case is remanded to the court below for execution.

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Cassidy v. Traction Co.

**COMPETENCY OF A PHYSICIAN'S REPORT UNDER THE
HEARSAY RULE.**

Common Pleas Court of Hamilton County.

WILLIAM CASSIDY v. CINCINNATI TRACTION CO.

Decided, April Term, 1917.

*Evidence—Report of Receiving Physician at Hospital Admissible, When
—Exemptions to the Hearsay Rule.*

1. Statutory provision for the maintenance and control of a free public hospital by a municipality, with authority in the director of public safety to provide rules and regulations for its government, and a rule requiring the receiving physician to make a written report of each case with his diagnosis, renders such a report a public document or record, and therefore admissible in evidence.
2. But were such a record not a public document in the usual meaning of that term, it would still be a record made by the receiving physician in the usual course of his business and as a part of his duties and, in the absence of such physician from the state, proof that the record is in his handwriting would make its admission competent under the exceptions to the hearsay rule.

John C. Rogers, for plaintiff.*James G. Stewart*, contra.

MAY, J.

Motion for new trial.

This was an action for personal injuries against the defendant company for negligently running down the plaintiff at a street crossing. The jury, by unanimous verdict, found for defendant.

The principal error complained of is the admission over objection of plaintiff of the record of the Cincinnati Hospital, showing the admission of the plaintiff on a Saturday night, with the diagnosis, "Acute Alcoholism," and his discharge the following morning. The clerk of the hospital, in whose charge the record was, testified that he was familiar with the handwriting of the receiving physician who made the same and that the physician was not in the state and had left for parts unknown.

The plaintiff contends that the record was not a public document or a public record, because there was no legislative authority for the keeping of such a record, and cites in support of his contention, *Fondi v. Boston Mut. L. Ins. Co.*, 224 Mass., 6, 8; *Richmond v. Patterson*, 3 Ohio, 369; *Durfee v. Abbott*, 61 Mich., 471. The Massachusetts and one of the New York cases sustain the contention of the plaintiff; the other cases are easily distinguishable from the case at bar.

I am of the opinion that there is legislative authority for the keeping of such a record, making it a public record. Section 4021, General Code, provides that the council of each municipality annually may levy and collect a tax to maintain a free public hospital; and Section 4035, General Code, provides that the director of public safety shall have the entire management and control of such hospital, and shall establish rules for its government, and the admission of persons to its privileges. The evidence of the clerk was to the effect that there was a rule requiring the receiving physician to report a history of the case and his diagnosis. It therefore seems to me that these statutory provisions taken together with the rule of the director of public safety make the record admitted in the evidence, over the plaintiff's objection, a public document in the sense in which that term is used in the cases.

If, however, such a record is not a public document within the usual meaning of that term, I am of the opinion that the record was one made in the usual course of business by the receiving physician, and as part of his duties and therefore was admissible, proper proof having been produced that it was in his handwriting, made by him in the usual course; and that he was absent from the state, under the general rule that entries or records made in the usual course of business by one whose duty it is to make the same, are exceptions to the hearsay rule. See *Wigmore on Evidence*, Sections 1521 and 1522, and cases cited.

Even if there was error in the admission of this record, I do not think it was prejudicial error, when the whole record in this case is taken into consideration.

For these reasons the motion will be overruled.

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Schriefer v. Safe-Cabinet Co.

JURISDICTION OF THE SUPERIOR COURT OF CINCINNATI.

Superior Court of Cincinnati.

EDWARD G. SCHRIEFER V. THE SAFE-CABINET COMPANY.*

Decided, January 5, 1917.

Corporations—Not Subject to the Jurisdiction of the Superior Court of Cincinnati, When—Personal Service on President or Managing Agent Not Sufficient to Confer Jurisdiction, When—Section 1571, General Code.

The jurisdiction of the Superior Court of Cincinnati over corporations is restricted to such only as are located in Cincinnati or have their principal office or place of business in said city; and personal service in Cincinnati upon the president or managing agent of a corporation, not located in said city or having its principal office or place of business therein, does not confer jurisdiction.

Otto Pfleger and Joseph Sagmeister, for plaintiff.

Gideon C. Wilson, contra.

GUSWEILER, J.

This cause is before the court on a motion to quash service of summons, for the following three reasons, to-wit:

1. For the reason that the defendant is a corporation created by the laws of the state of Ohio, and doing business and having its principal office and place of business in Marietta, Washington county, Ohio, as alleged in the petition filed in this cause, and that it has no principal place of business in the city of Cincinnati, Hamilton county, Ohio, and for that reason no valid or lawful service of a summons issued out of the Superior Court of the City of Cincinnati, Ohio, can be made on this defendant in the manner in which same was attempted to be made.

*In a memorandum opinion, published in the *Court Index* of September 11, 1918, the Court of Appeals said:

"The opinion of the court below, written by Gusweiler, J., and concurred in by Merrell and Pugh, JJ., has been submitted to this court, and upon a full consideration of the record this opinion is approved and the judgment is affirmed."

2. For the reason that the Superior Court of Cincinnati, Ohio, has no jurisdiction over this defendant in this action, and for that reason this court has no authority in law to issue and have served upon the defendant a summons, as has been attempted to be done in this case.

3. For reasons appearing upon the face of the petition.

There seems to be no dispute as to the fact that at the present time the defendant corporation has its principal place of business at Marietta, Ohio. The sole issue is, can the Superior Court of Cincinnati obtain jurisdiction over this defendant corporation, with its present principal office located elsewhere than in Cincinnati, by serving its president personally and its managing agent personally here in Cincinnati.

General Code, Sections 1571, part 4, 1576 and 11272, are involved for construction as to this issue. This court is not a constitutional court, but is a creature of the Legislature with only such power and authority as is given specifically by the Legislature. G. C. 1571, part 4, specifically recites the limitations for jurisdiction over corporations, requiring that the defendant corporation must be situated in the city of Cincinnati or must have its principal office or place of business in the city of Cincinnati. We are of the opinion that this section restricts the jurisdiction of this court over corporations to such only as are located in Cincinnati or have their principal office or place of business in Cincinnati, and that no other section of law can by inference or construction enlarge this specific limitation. Because of the question of jurisdiction affecting this court, the matter has received the careful and serious individual consideration of all its members. We have conducted our investigation and consideration with the jealous desire to hold the jurisdiction, and have endeavored to construe the sections of the law mentioned in such a manner as to make each workable, effective and consistent. We are each and all of the opinion that the court is without jurisdiction in this case, and the motion to quash the service of summons will be granted.

MERRELL, J., and PUGH, J., concur.

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Rea, Excr., v. Griffin et al.

CONSTRUCTION OF A WILL CONTAINING TRUSTS.

Common Pleas Court of Madison County.

MATTHEW L. REA, EXECUTOR OF THE LAST WILL AND
TESTAMENT OF SARAH J. JOHNSON, DECEASED, v. HENRY
CLAY GRIFFIN ET AL.*

Decided, August 14, 1916.

Wills—Vague Description of Land Devised—Uncertainty as to Remaindermen—Failure to Numerate Correctly Members of a Class Resolved in Favor of the Class—Bequest to Charity Held to have Failed—Where Its Disposition was Left Entirely to the Discretion of the Executor an Executor Names, Whose Death Antedated that of the Testatrix—Personal Character of Such a Trust Makes the Executor Indispensable to Its Validity—Funds Designated for a Trust which Has Been Declared Void Fall Into the General Assets of the Estate—Division of Crops on Lands Devised—Purpose Shown to Augment a Certain Fund.

1. A devise of 100 acres of land to be taken from a larger tract, and directing that the smaller tract shall lie along two certain boundary lines and have a good outlet on a certain road and be of the best shape possible, is not so vague and indefinite as to make the devise void.
2. Where a devise was made to L D for life, with remainder over to "the brother and two sisters, their heirs and assigns forever," when at the time of execution of the will and at testatrix's death L D had living three brothers, one sister and a niece, the daughter of a deceased sister, the testatrix will be presumed to have intended to give the remainder to the brothers and sister of L D as a class; and a mistake in the number of members of such class will not render the devise void for uncertainty. But where such class is related to testatrix by affinity only, the case of sur-

*An appeal was taken from so much of this decision as relates to Item Eleven, and on July 17, 1917, the appeal was sustained by the Court of Appeals for Madison County. Error was then prosecuted to the Supreme Court, where on June 21, 1918, the judgment of the Court of Appeals was reversed and that of the Common Pleas affirmed, under the title of *Rogerset et al v. Rea, Trustee.*

viving issue of a deceased member of the class does not come within General Code 10581, the devise as to such member lapsing and passing to the members of the class surviving testatrix; and words "heirs and assigns" of the devisee will be construed as words of limitation and not of substitution.

3. A residuary bequest was made to C "for any such charitable purposes that he may deem proper and designate in such amounts as he may designate and think best, for permanent or temporary charities," but C had died prior to the testatrix, and the probate court appointed the executor of the will also trustee to carry out such charitable trust. *Held*: (1st) the item would create a valid charitable trust if the trustee were living. (2) The discretion vested in the named trustee is so personal in its nature and so comprehensive in its character as to make him indispensable to the validity of the trust. (3) No charitable trust was created independent of the named trustee. A bequest to charity generally without the presence of some one to exercise the discretionary power granted in the will, must fail.
4. Where a trustee has been appointed by the court under a certain item of a will, the item being void so far as the trust is concerned, the directions in such item for the trustee to collect certain notes should be carried out by the executor instead of the trustee.
5. Where a testamentary trust is void, testamentary directions to the trustee of such void trust to collect certain notes and place the money in the trust funds will not be carried out by the trustee; but the executor should make such collections, placing same in the general assets of the estate.
6. J. instructed her executors that "all such rents or crops that would be coming to me in case of my death, not so occurring from any of the tracts of land herein specifically devised, shall be divided one-half to my estate and the other half thereof to the person to whom said tract of land is so devised." *Held*: That each devisee was entitled to one-half of the gross rents or crops of his devise, in view of the further facts that entire will reflects a liberal spirit in J, and that the same item containing such devise shows that she was mindful of the usual expense charges on lands.
7. A testamentary direction to J's executors to sell her real estate not specifically devised, and put the proceeds in the trust fund shows that the purpose of J was to augment such fund; and where the trust proved to be void, such sale should not be made in pursuance to said direction; and such realty descends as such and not as personality.

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HORNBECK, J.

This is a suit to construe certain items of the will of Sarah J. Johnson. The petition recites that testatrix died in Champaign county, Ohio, on or about the 13th day of May, 1914; that O. P. Converse and Matthew L. Rea were appointed executors by the will; that O. P. Converse, joint executor under the will and named trustee under Item Eleven thereof, died prior to the testatrix; that the said Matthew L. Rea is the duly appointed, qualified and acting executor of testatrix, and was in June, 1915, appointed trustee under Item Eleven of said will by the Probate Court of Champaign County, Ohio.

The instruction of the court is required of Item Nine of said will, which reads as follows:

"I do hereby give, devise and bequeath unto Lida Douglass, a daughter of Ann Johnson Douglass, and a niece of the late R. M. Johnson, for and during the period of her natural life, one hundred acres of land, to be taken out of what is known as the Warner land, in the following shape, to-wit, to come out of said lands which are situate in Madison County, Ohio, in the best shape possible, so as to lay along the Cartmell and Fitzgerald land lines and at the same time give said one hundred acres a good outlet onto the Kioussville and Jeffersonville road, and at her death all of said one hundred acres is to pass to and vest in the brother and two sisters of the said Lida Douglass, their heirs and assigns forever."

Lida Douglass was one of seven children of Ann Johnson Douglass, having four brothers and two sisters, but at the time of the death of the testatrix and at the date of the execution of her will, said Lida Douglass had living three brothers and one sister and a niece, a daughter of a deceased sister. It is claimed that this item is insufficient in two particulars, first, because of vagueness and indefiniteness in the description of the one hundred acres sought to be devised; and second indefiniteness in the naming of the remaindermen in that the item says "the brother," whereas there were three brothers, and the "two sisters" when there was but one sister.

If the item had devised one hundred acres to Lida Douglass to be taken from the Warner land, and the Warner land had con-

tained more than one hundred acres, the devise would have been valid and a right of selection would have been given the devisee (*Galbraith v. Bowen*, 5 Pa. Dist. R., 352). But our description is more specific. We have at least two lines of the one hundred acre tract contemplated by Item Nine fixed, viz., the Cartmell and Fitzgerald land lines, and the further direction that said one hundred acres shall have a good outlet on to the Kiousville and Jeffersonville road, and further that, taking these instructions into consideration the one hundred acres shall be laid out in the "best shape possible."

It is well settled that descriptions for the purpose of a will need not be as complete nor as accurate as for a deed. The language of the item is sufficiently definite to permit the selection of the land devised.

The use of the phrase "best shape possible" indicates a desire on the part of the testatrix to give to the life tenant and remaindermen a farm with lines such as are recognized as being common to well shaped farms, and there should be no serious difficulty in setting off this one hundred acre tract. A competent surveyor should be called and the tract should be laid out in the best shape possible, subject to the requirements of the item, and selection should be made on his recommendation. Although the item probably gives the right of selection, subject to the restrictions therein, to the life tenant and remaindermen, yet I believe the general estate should have a word in naming this surveyor, and would suggest that the executor and life tenant and remaindermen select a competent surveyor to set off the one hundred acre tract, as above indicated.

If this suggestion is not found practicable, or for any reason can not be carried out, let the matter be made known to the court and such further action will be taken as may be necessary to carry out the intention of the item.

The question which arises relative to the failure of the testatrix to indicate with particularity the remaindermen, in that she provides that at the death of Lida Douglass said one hundred acres is to pass to and vest in the *brother* and *two* sisters of the said Lida Douglass, when Lida Douglass had at the time of the

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making of the will and at the death of testatrix *three* brothers and *one* sister, is one concerning which the court has been in some doubt.

The life tenant, Lida Douglass, had *four* brothers and *two* sisters, all children of Ann Johnson Douglass. No evidence is offered of the extent of familiarity of the testatrix with the nephews and nieces of her husband, nor of how closely she kept in touch with them during the latter years of her life, nor of how well she had in mind their names, nor whether she knew they were living when she made the will, nor does any reason appear why she should favor one of the nephews more than the other. It seems that she desired this one hundred acres in remainder to vest in the children of Ann Johnson Douglass, excepting Lida Douglass. It is evident that Mrs. Johnson must have known that, if Lida Douglass had three brothers, in order to benefit one brother only he must necessarily have been named, that if, having in mind all of the brothers then living she had meant to discriminate against the other two brothers, she certainly would have made it explicit by naming the one brother that she meant to favor. This she failed to do. She did not know of the decease of one of the sisters of Lida Douglass, because she speaks of the two sisters of Lida Douglass. But taken all together she indicates an intention to benefit members of a class, all of whom are alike the objects of her bounty, viz., the children of Ann Johnson Douglass, excepting Lida Douglass, whom she preferred by granting a life estate in the whole of the one hundred acres.

It will not be urged that the meaning of this item is entirely free from speculation, but it seems to come within a class of cases, wherein the failure of the testator to enumerate correctly members of a class, sustaining identical relationship toward him, is resolved in favor of the members of that class.

Underhill on Wills, page 742:

“If the testator in providing for the children of another and even when the gift is to his own children, states the number of children he wishes to benefit, and the number which is thus

stated is less than the actual number of children the court has power to correct his mistake. Where the number is understated, all the children will take the gift, upon the very reasonable presumption that the understatement was unintentional and inadvertent, and that it did not indicate an intention to discriminate among the children. If this construction and correction are not resorted to and permitted, the provision for children incorrectly enumerated will be void for uncertainty. And the presumption of mistake is recognized where the gift is to the children of the testator as where it is to the children of another." And cases cited.

And in *Vernor v. Henry*, 6 Watts. (Pa.) 192, cited by counsel for defendants Martha B. Douglass et al, Vernor devised as follows:

"I give and devise unto the *two* daughters of my deceased brother John Vernor, and unto John T. Vernor, a grandson of my said brother John, deceased, my plantation or tract of land whereon I now live; to have and to hold the same to them, the two daughters of my deceased brother John Vernor and to the said John T. Vernor, their heirs and assigns forever in fee, that is to say each of them is to have an equal third part thereof."

John Vernor, the testator's brother, having had *three* daughters when the will was made, and at the death of the testator, *held*, that the devise was not void for uncertainty, but that the three daughters took by it two-thirds of the land.

And the court at page 203 says:

"Now in the present case, the circumstance of the testator having used the definite article 'the' in connection with the word 'two' shows pretty clearly that he dictated and made his will under the belief that his brother had left but two daughters, for if he had been impressed differently and had then recollected that there were three, according to what he had been before told, perhaps more than once, and he had only intended to give to two of them, it is difficult, if not impossible to account for his having omitted to describe in some way, the two whom he intended to make the objects of his bounty, so that they might be distinguished from the third whom he wished and decided to exclude."

And at page 206:

“It is merely correcting a mistake of the testator made as to the true number of those who appear to have been all alike the objects of his bounty; and this is done either by striking out the number inserted, without more, or by reading it as if it were written ‘all’ instead of two or three as it may happen to be. This is every day practice in the construction of wills in order to effectuate the plain intention of the testator. Mr. Roper, who has collated the cases on this subject, lays it down as settled, that ‘If a testator bequeath to part only of a number of individuals of the same description and none of them are named nor can be identified, either by the will or by extrinsic evidence it is to be presumed that he intended the whole class of persons and was mistaken in the number when confining his bounty to three or four of the class by the insertion of these words. These restrictive expressions are therefore rejected and the entire number of individuals answering the description are admitted as legatees.’ See also *Garvey v. Herbert*, 19 Ves., 124; *Harrison v. Harrison*, 1 Russ & M., 72; *Spencer v. Ward*, L. R., 9 Eq., 507, and cases cited in Roper on Legacies, under the heading ‘mistake.’ ”

If the court is correct in concluding that the remainder created by the item is a devise to a class, viz., the brothers and sisters of Lida Douglass, the children of Ann Johnson Douglass, another question is presented and that is, what if any estate do the heirs of the deceased brother, Charles Douglass, and the niece of Lida Douglass, Fate Knock, child of the deceased sister, take?

The common law rule is, that upon the death of a member of a class prior to the death of the testator, the share which that member would have taken, had he lived, lapses and passes to the members of the class surviving the testator (*Wooley et al v. Paxson et al*, 46 O. S., 317). Unless this rule has been changed by statute it must govern here.

Section 10581, Revised Statutes of Ohio, provides that—

“When a devise of real or personal estate is made to any child or other relative of the testator, if such child or other relative shall have been dead at the time of the making of the will or shall die thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised in the same manner as the devisee would have done if he had survived the testator.” * * *

Unless the phrase "other relative" in the foregoing statute is broad enough to protect the representatives of the deceased brother and sister of Lida Douglass, it would seem that their shares must fail under the rule prior to the enactment of the statute.

Ann Johnson Douglass was a sister of testatrix's husband, and her children, brothers and sisters of Lida Douglass, are only related to the testatrix by affinity. Our Supreme Court has held in the case of *Schaefer et al v. Bernhardt et al*, 76 O. S., 443, in construing the words "other relative" as they occur in Section 5971, R. S., now Section 10580, General Code, that—

"The phrase 'other relative' should, in accordance with the maxim *noscitur a sociis*, be restricted to relationships of the character indicated by the associated word 'child' and regarded as including those which are consanguineous, but excluding those which are affinitive merely."

And see 40 Cyc., 1453 B (11), *Strong v. Smith et al*, 48 N. W., 183-5. And this construction will obtain notwithstanding the use of the words, "their heirs and assigns" in the item following the devise in remainder. These words being used as words of limitation and not substitution. *Wood v. Seaver*, 158 Mass., 411; 33 N. E., 587; *In re Wells*, 21 N. E., 137; *Chinch v. Chinch*, 23 Atl., 302; *Horton v. Earl*, 38 N. E., 1136; *Linton v. Laycock*, 33 O. S., 128.

In view of the above cited authorities and the construction of Section 10580, General Code of Ohio, the three brothers of Lida Douglass, M. M. Douglass, William W. Douglass and Thomas C. Douglass, and the sister Mary E. Douglass (their heirs and assigns), all of whom survived the testatrix, will share equally in remainder in the one hundred acre tract, the life estate of which is in Lida Douglass.

The next item presented for consideration is No. 11 of the will of Sarah J. Johnson, which reads as follows:

"After all the balance of the land of which I die seized is sold and converted into money as hereinafter provided, then I do hereby give, devise and bequeath to O. P. Converse of London, Madison county, Ohio, all of the balance and residue of my estate

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whether it be money or uncollected notes and securities, in trust for the following purposes, to-wit: To collect any uncollected notes that he can reasonably collect, and then to use all the remainder of such notes and the balance of money belonging to my estate including any that may be so realized from any of the said notes and securities for any such charitable purposes that he may deem proper and designate in such amounts as he may designate and think best, for permanent or temporary charities, and no bond shall be required of him in so doing."

It is claimed by certain of the defendants that this item is void for uncertainty. It is contented by the trustee that it creates a valid trust, and in his answer and cross-petition he says that he desires to designate that the property coming into his hands under Item Eleven, may be turned over to Madison county, Ohio, for the erection of a county hospital and for the maintenance thereof.

The question here raised is approached by the court with the knowledge that, in so far as Item Eleven of the will speaks, Sarah J. Johnson, the testatrix, intended the residue of her estate to pass to permanent or temporary charities; that it is a duty to sustain, if possible, the provisions thereof; that if by any interpretation consonant with the expressed intention of the testatrix this item can be administered it should be done (*White v. Howard*, 38 Conn., 386; *Sanderson v. White*, 18 Pick., 333); that the testatrix designated O. P. Converse to select the particular objects of charity and the beneficiaries thereunder; that the present trustee is as competent to carry out the duties of the trust, if a trust is created, as any that this court could name; that the particular object indicated as the selected charity, a county hospital to be erected and operated on land belonging to Madison county, is a most worthy purpose and one which comes within the purview of "a charity," i. e., "a gift to a general public use which extends to the rich as well as the poor." Camden, Ld. Ch., in *Ambl.*, 651.

It is said that "Precedents are useful only slightly, or not at all upon questions of construction." Proceeding on that theory, a conclusion might be drawn at variance with precedents on the

subject, but there is a wealth of decisions on the principle involved here and from these authorities the matter will be decided with the belief that it represents the law at this time.

Counsel have provided most exhaustive and comprehensive briefs on the proposition involved. In the main, the argument against the validity of the item has been confined to the contention that the discretion vested in O. P. Converse, as trustee, was such that without him it must fail. Although the determination of this one phase of the question would dispose of the whole matter effectually, it will be discussed from three angles.

First. Would the item create a charitable trust, if the named trustee were living?

Second. Is the discretion vested in the named trustee so personal in its nature and so comprehensive in its character as to make him indispensable to the validity of the item?

Third. Which is but a corollary of the second. Was a charitable trust created independent of the named trustee?

1st. Would the item create a charitable trust, if the named trustee were living? If O. P. Converse had lived there might be some doubt if the item under consideration created a charitable trust. The discretion vested in him was limited in one particular only. He was required to expend *all* of the residue of the estate of the testatrix for permanent or temporary charities. He had not the power to retain any part of it for himself; it thus fell short of a gift; his discretion extended not only to naming specific purposes of the bequest but specific beneficiaries; it was as broad as the power of the donor herself over the same money for the same purposes; every charity of every kind and description in every corner of the earth is within the scope of the language of the item.

The Circuit Court of Cuyahoga County, as recently as 1911, in the case of *Collings v. Davis*, 17 C.C.(N.S.), 221, held a clause in the will under consideration to be void because, among other reasons, the beneficiaries were not restricted to any locality.

And in *Bristol v. Bristol* (Conn.), 5 Atl., 687:

"Item. I authorize, empower and direct my wife to permanently dispose for such charitable purpose as she may deem

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proper, the other one-fourth of said income from said permanent trust fund."

■

The court at page 692 says:

"It is well established with us that a gift to a charitable use must designate the particular charitable use by making the gift to some particular object or purpose that the law recognizes as charitable. It is enough if the object be mentioned and the law can see that it is a charitable use; but it is not enough that the gift be merely to charitable uses or to be used in charity so long as no selection is made from a long list of recognized charitable objects. And it is not enough that some person is named to whom is given the power of naming the charity. That is the testator's own matter. It is his intent that is to determine that. If he chooses to leave the matter wholly to the discretion of some person named, he can do so by making the gift to him, leaving him to use his discretion as to the disposition of it. * * * Here the power given the widow is not to select the particular beneficiaries of a class named, but to select the charity itself. We think that to uphold this case we should have to go beyond the utmost limits to which we have gone in upholding charitable gifts. The bequest being of such a character, it clearly can not be saved by the act of the widow in making a written designation of the charitable purposes which by it she is authorized to select."

And likewise *Norcross' Admrs. v. Murphy's Exr's*, 44 N. J. Eq., 522; 14 Atl., 903; *Beckman v. People*, 27 Barb., 260; *Maught v. Getzendanner*, 65 Mich., 527; 5 Atl., 471; *Schmucker v. Reel*, 61 Mo., 592; *Grimes v. Harmon*, 35 Ind., 198; 9 Am. St. Rep., 690; *Coleman v. O'Leary*, 114 Ky., 388; 70 S. W., 1068, and *Williams v. Kershaw*, 5 Clark & F., 111, cited by counsel for defendants, although this case is virtually overruled in *Giles v. Burns*, 2 Wiles & Stan., 80.

But there is substantial authority to the effect that the item in the will before us, had the named trustee lived, created a valid charitable trust.

In re Estate of Mary C. Dulles, 218 Pa., 162; 67 Atl., 49:

The item under consideration—

"I do hereby give and grant unto my said executors and the survivors of them full and unlimited power and authority to pay over, appropriate and dispose of and distribute the said rest, residue and remainder of my estate to and among such religious, charitable and benevolent purposes and objects or institutions as in their discretion shall be best and proper." *Held*, to establish a valid charitable trust.

The court say :

"The discretion which was hers (the testatrix's) to exercise she chose to delegate to her executors. It was her right to do so, and so long as this discretion is not abused, its exercise is as valid as if it were expressly her own."

And quoting Strong, J., in *Domestic & F. Miss. Soc. App.*, 30 Pa., 425, 435:

"The general rule may be stated thus, in the case of a will making a charitable bequest, it is immaterial how vague, indefinite and uncertain the object of the testator's bounty may be, *provided there is a discretionary power vested in some one in its application to those objects.*"

To the same effect: *Kinnike's Est.*, 105 Pa.; 25 Atl., 1016; *In re Creighton's Est.* (Neb.), 84 N. W., 273; *Hunt v. Fowler*, 121 Ills., 269, 12 N. E., 331; *Hinkley Est.*, 58 Cal., 457; *Jackson v. Phillips et al*, 14 Allen, 539; *Grant v. Saunders* (Iowa), 95 N. W., 411; *Re Steward*, 26 Wash., 32; 67 Pac., 723; *Miller v. Teachout*, 24 O. S., 525; *Hunt v. Edgerton*, 9 C.C. (N.S.), 538.

The validity of the clause as presented if the named trustee had lived is not vital here, unless the court is in position to hold that even had he lived the language of the item is too indefinite and vague to creat a charitable trust; this view of the matter the court is not ready to take. The tendency of the holdings seems to be toward the greatest possible liberality favorable to declaring a charitable trust, if the trustee named is given discretion sufficient to define the particular objects of charity to be reached.

2d. Is the discretion vested in O. P. Converse such as to make him indispensable to the validity of the item? The discretion

with which the testator clothed O. P. Converse was so peculiarly personal as to make him essential to the creation of a charitable trust under Item Eleven; he is necessary that the intention of the testatrix may be particularized; that the will may speak definitely he is the *sine qua non*. No other can indicate the testatrix's specific wishes; his purposes were her purposes; the will itself says so. It does not say that his successor may have the power granted to him; nor does it indicate what charities are to be beneficiaries, so that the court or any one else can do aught but act in the dark. Any trustee, other than O. P. Converse, so far as the will speaks, if disposing of the money under Item Eleven, would be placing it solely and entirely with such charities as his own mind suggested and without any expression by the testatrix that the beneficiaries selected by him had been directed by her or reflected her desire.

In *Fontain v. Ravenel*, 17 How., 369 (which was a case in which the gift was for general charities, at the discretion of the executors, who were all dead), Judge McLean in the opinion clearly discusses the question. He admitted that the executors, had they been alive, might have executed the trust, but as they were dead, he says at page 386:

"The testator was unwilling to give this discretion to select the objects of his bounty except to his executors. He relied on their discrimination, their judgment, their integrity and fitness to carry out so delicate and important a power. He made no provisions for a failure in this respect by his executors. * * * They died. And now what remains of this bequest on which a court of chancery can act? There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind them is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivors of them, but by the act of Providence that has become impossible. It is, then, as though he had not spoken. Can any power now speak for him except the *parens patriae*."

In *Chamberlayn v. Brockett*, L. J. Ch., 789, testatrix by will gave a legacy of one hundred pounds to each of several persons

“to be applied by each of them to such charitable purposes as each may think most desirable.” Some of those persons died in the testatrix’s life time. *Held*, that the legacies given to those persons lapsed because the object of the gifts could not be ascertained.

And in *Pritchard v. Thompson*, 95 N. Y., 76, in which a certain sum of money was left in trust to be by the named executors or the survivors of them distributed to stipulated charities, as such executors might select, in such sums as they might determine. The court say:

“If they (the executors) refuse to execute it, or the power remains unexecuted, it is not apparent how the court could make a selection from the extensive range of societies referred to, of those that should receive the bequest, or of the proportions in which it should be divided. Neither could the court select individuals to perform a duty devolving upon the trustees, who are selected, no doubt, by reason of personal confidence in their judgment and their capacity for the task imposed.”

In *Re Estate of Dulles, supra*, it is said:

“The practical questions, therefore, in such case (referring to charitable bequests wherein discretion was vested in the trustee), are First. Is the testator’s general intent ascertainable? and Second. Is there any tribunal provided to ascertain the specific objects to which such intent was to be applied? If so, the trust is not void for uncertainty.”

In this case the first question can be answered in the affirmative; but we are constrained to answer the second question in the negative.

And the rule was early enunciated in the leading case of *Witman v. Lex*, Searg. & Rawle’s Reps., 17-93:

“It is immaterial whether the person to take be *in esse* or not, or whether the legatee at the time of the bequest was a corporation capable of taking or not, or how uncertain the object may be, *provided there be a discretionary power vested anywhere over the application of the testator’s bounty to those objects.*”

See *Hibbard v. Lamb*, 1 Ambl., 309; *Holland v. Peck*, 37 N. C. (2 Ired Eq.), 255; *Gambel v. Trippe* (Md.), 15 L. R. A., 235.

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3d. Does the item create a charitable trust independent of O. P. Converse. It is contended that the testatrix has, independent of the named trustee and the language pertaining to him, by Item Eleven established a charitable trust, and that equity will not suffer a trust to fail for want of a trustee. *This rule presupposes an established trust.*

The clause in question, eliminating the words stating the extent of discretion reposed in the named trustee, in so far as we need to consider it here, reads as follows: "I do hereby give, devise and bequeath to O. P. Converse * * * all the balance and residue of my estate * * * in trust, for permanent or temporary charities." There is, as before indicated, in the language no limitation in the field of charity. "Permanent or temporary charities" is equivalent to an expression of a general charitable purpose. This being the effect of the language used, will it sustain a charitable trust.

There can be no doubt but that in England, under statute 43 Elizabeth, Chapter 4, and even before that time, under the common law, this item, as above outlined, would have been sustained, *cy pres*, as a charitable trust.

Our law has been an outgrowth of the English jurisprudence on the subject of charitable trusts. The burden of discussion of the cases arising in our courts has revolved around the English precedents in point, whether to follow in the entirety the established holdings of the chancery court relative to charitable trusts, to modify them to more properly represent the spirit and functions of our equity courts, or whether to deny them altogether. The value, therefore, of the cases cited by counsel for and against the validity of Item Eleven, and of all cases considered, depends largely on the attitude assumed by the courts of the states wherein they arose, toward the English construction of the statute of uses.

The following states have adopted, either directly or on principle, the doctrine of the statute of uses, 43 Elizabeth, Chapter 4:

Illinois—*Hoeffer v. Clogon*, 171 Ills., 462; 49 N. E., 527.

Massachusetts—*Goings v. Emery*, 16 Pick., 107.

Missouri—*Chambers v. St. Louis*, 29 Mo., 543.

North Carolina—*State v. Gerard*, 37 N. C. (2 Ired Eq.), 210.

Rhode Island—*Pell v. Mercer*, 14 R. I., 412.

Maine—*Tappin v. Deblois*, 45 Me., 122.

Georgia—*Jones v. Habersham*, 107 U. S., 174.

Alabama—*Williams v. Pearson*, 38 Ala., 299.

Pennsylvania—*Fontain v. Ravenel*, 17 How., 369.

Tennessee—*Dixon v. Montgomery*, 1 Swan, 348.

New Jersey—*Thomas v. Norris*, 20 N. J. Eq., 489.

Delaware—*State v. Griffith*, 2 Del. Ch., 392.

Wisconsin—*Harrington v. Pier*, 105 Wis., 485, 82 N. W., 345.

Connecticut—*Ayde v. Smith*, 44 Conn., 60.

Indiana—*McCord v. Ochiltree*, 8 Blackf., 15.

Ohio. No force as a statute—*Landis v. Wooden*, 1 O. S., 160, yet the judges of that state, without any assumption, have applied its principles to all cases of charitable devises as a part of chancery jurisdiction.—*Perin v. Carey*, 24 How., 465.

The statute is not in force in the following states:

Maryland—*Barnes v. Barnes*, 3 Cranch. C. C., 269; *Halsey v. Protestant Episcopal Church*, 75 Md., 275; 23 Atl., 781.

District of Columbia—*Ould v. Washington Hospital*, 95 U. S., 303.

Virginia—*Fifield v. VanWick*, 94 Va., 557; 27 S. E., 746.

West Virginia—*Wilson v. Perry*, 29 W. Va., 169; 1 S. E., 302.

Michigan—Repealed in 1910—*First Society of M. E. Church v. Clark*, 41 Mich., 730; 3 N. W., 207.

New York—*Reformed Protestant Dutch Church v. Mott*, 7 Paige, 77. But New York by statute in 1893 has vested in equity courts power to sustain charitable trusts, which before that period would have been invalid.

The principles of the statute and the common law of England, which it was enacted to supplement, being in effect in Ohio, we must depend on decisions from those jurisdictions wherein a similar position to that of Ohio toward the statute is maintained. That our courts look with favor upon the holdings of those states wherein the spirit of the statute has been upheld, has been indicated by our Supreme Court in the case of *Müller v. Teachout*, 24 O. S., 533.

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The Lord Chancellor of England was vested, by virtue of his office, not only with the ordinary judicial powers of chancery court, but in addition thereto with prerogative power from the King, as the keeper of the Great Seal. Enunciating decisions from the same court, having these dual powers, it became difficult to determine from which source he was effectuating these general charitable bequests, wherein no mode of disbursement was indicated. It is now very generally understood to have been accomplished by means of the prerogative power rather than by inherent judicial authority.

Our courts by their very nature are confined to inherent judicial authority, and have no other or further power akin to the extra-judicial or prerogative power of the English chancery court. In this fundamental difference is found the reason that our courts have said that they are without source of authority to complete or particularize these bequests to charitable purposes generally.

A consideration of some of the authorities on the method of the chancery court of England in administering bequests such as we are now considering, and a determination wherein the difference lies between the power of our equity courts and that of England, will, in view of the phase of the item that we are now discussing, be of interest, and will demonstrate why it could have been administered in England and not generally in this country.

In *Harrington v. Pier*, 105 Wis., 485, 82 N. W., 345, in a discussion of *cy pres* power, it is said:

“*Cy pres* power, as actually understood, has two features,—one, the right to exercise *prerogative authority* enabling the court to deal with a bequest to a charitable use having no designated particular purpose, *as a bequest to charity generally*, treating the purpose as the legatee, or a bequest for an illegal purpose, or some purpose impossible of execution for some reason; and the other, the right by liberal rules of construction, to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee if necessary.”

And in *Grimes v. Harmon*, 35 Ind., 198, 9 Am. Rep., 690:

"The prerogative power of the King, exercised by the chancellor with reference to charitable trusts in England, was derived directly from the king under his sign manual, and was not conferred on the courts by statute of 43 Elizabeth."

And in *Newson v. Starke*, 48 Ga., 88:

"In determining what bequests for charitable purposes are definite and specific and capable of being executed, a court is to be guided by well settled rules of the court of chancery in England in the exercise of its *inherent chancery jurisdiction* over charities, as distinguished from its jurisdiction as agent of the King in the exercise of *his prerogative power* to direct and give effect to indefinite charitable bequests. It is only that branch of equity jurisdiction which undertakes to carry into effect *charities generally* where there are no trustees, which is *prerogative*; when trustees are appointed or when the objects of the charity are pointed out, even generally, the court acts by its inherent power over trusts."

And in *Moore v. Moore*, 4 Dana, 354, 29 Am. Dec., 417:

"When a charity is not given to trustees, and *no particular object is designated*, nor any person appointed to select the object, the King appoints the object under his sign manual, and the chancellor, * * * directs the application by the Attorney-General to the Crown to make the appointment."

And in *Shield v. Jolly*, 1 Rich. Eq., 99, 42 Am. Dec., 349:

"A charity at large, where there is a gift simply to purposes of charity, without appointment of any trustee, is not within the jurisdiction of the chancellor as a court of equity, but is one to be enforced by the chancellor * * * by virtue of the prerogative."

And *Rhode Island Hospital Trust Co. v. Olney*, 14 R. I., 449:

"The general devolution upon the courts of all judicial power in respect to charities includes so much of the *cy pres* power as is exercised by the English chancellor, *without recourse to the prerogative powers*, delegated to it in particular cases by the sign manual."

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And in the noted case of *Jackson v. Phillips*, 14 Allen, 539, wherein the court was considering the validity of articles in the will of Francis Jackson, of Boston, in which he gave to William Lloyd Garrison, Wendell Phillips et al, a certain sum of money in trust to create public sentiment against negro slavery, Judge Gray in a general discussion of the *cy pres* doctrine at page 576 of the opinion says:

"The second class of bequests which are disposed of by the King's sign manual is of gifts to charity generally, with no use specified, no trust interposed and either no provision made for an appointment or the *power of appointment delegated to particular persons who die without exercising it.*" Citing Boyle on Charities, 238-9. "This too, is not the judicial power of expounding and carrying out the testator's intention but a *prerogative power* of ordaining what the testator has failed to express. *It has never so far as we know been introduced into the practice of any court in this country* and if it exists anywhere here it is in the legislature of the commonwealth as succeeding to the power of the King as *parens patriae*. It certainly can not be exercised by the judiciary of a state whose constitution declares that 'the judicial department shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.'"

See also *Pell v. Mercer*, 14 R. I., 436; *Morgridge v. Thackwell*, 7 Ves., 36; *Perry on Trust*. Par. 718; Underhill on Wills, Par. 824-827; *Kelly v. Nichols*, 18 R. I., 62; 25 Atl., 840.

Notwithstanding the trend of the above cited decisions and the unqualified language of *Jackson v. Phillips*, *supra*, the courts of Massachusetts have sustained *cy pres* a bequest to charity generally, when the trustee named to whom was delegated broadest possible discretionary power, died before accepting the trust. A case more nearly like the one at bar than any other found, wherein the trust is sustained, is that of *Minot v. Baker*, 17 N. E., 839, decided by the Supreme Court of Massachusetts in 1888. Here the testator left the residue to a trustee "to be disposed of by him for such charitable purposes as he shall think proper." The trustee died, having rendered no account to the probate court, and having disposed of only a small portion of the

residuary estate in his hands for charitable purposes. He had not indicated any scheme for the disposal of the remainder of the estate in his hands. *Held*, that the gift should be applied to charitable purposes according to a scheme under the direction of the court. In this case the executor of the estate was likewise the trustee under the will, but had not been appointed by the probate court as trustee or qualified as such. He died without attempting to dispose of the residue of the estate for any charitable purpose whatever.

And in *Re Schouler*, 134 Mass., 426, testator authorized a person to withdraw the contents of the testator's bank book from a certain bank after his death "said money to be disposed of as follows: Part for my burial and funeral expenses and the residue for charitable purposes, masses," etc.

Held, that the will created a valid trust and that the nominee having died without having qualified as trustee, the court might appoint a successor who should administer the trust. This item, however, is not as broad in language as the one we have under consideration, it being possible to particularize it to the extent of restricting the charitable use to masses, in which event a trust undoubtedly would be created and a trustee necessarily appointed.

Outside of the state of Massachusetts, I have been unable to find a decision in any American case sustaining a charitable bequest, under conditions as now obtain in relation to Item Eleven of the Sarah J. Johnson will.

Webster v. Morris, 28 N. W., 353 (Wis.), 5 Syl., a bequest which upon the named contingency, is to be spent for charitable purposes, at large, is too indefinite to be executed. And the court at page 363, referring to the *cy pres* power say:

"Before that power can be exercised, however, the scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money 'for charitable purposes' at large, is too indefinite and uncertain to be carried into execution."

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See also *Norcross' Admrs. v. Murphy's Excrs.*, *supra*.

And in *Spaulding v. St. Joseph's Industrial School for Boys* (Ky.), 54 S. W., 200, the court at page 206, referring to the opinion of Chief Justice Robertson, in *Moore's Heirs v. Moore's Devises*, *supra*, say:

"We are satisfied that the *cy pres* doctrine is not or should not be, a judicial doctrine, except in one kind of case; and that is where there is an available charity to an identified or ascertainable object and a particular mode, inadequate, illegal or inappropriate, or which happens to fail has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the declared intention of the donor, and not arbitrarily and in the dark presuming on his motives or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor. But it does not act judicially when it applies his bounty to a specific object of charity selected by itself, merely because he had dedicated it to *charity generally*. * * * for the court can not know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar benevolence, has seen fit to decree its appropriation, whereby he and not the donor, in effect and at last creates the charity."

And in *Kronshage v. Barrell* (Wis.), 97 N. W., 929:

"All that is necessary is that a deviser shall place his property in trust and designate a charitable purpose of his own *narrower than the field of charity generally*. The court can and will then see to it that a trustee is provided, if none be designated, and that means will be found to apply the property to the purposes, if no method be prescribed." *St. James Orphan Asylum v. Shelby*, 60 Neb., 796, 80 N. W., 273; *Hunt v. Fowler*, 121 Ill., 269, 17 N. E., 491; *Erskine v. Whitehead*, 84 Ind., 359; *Miller v. Chittenden*, 2 Iowa, 315; *Holland v. Peck*, *supra*; *Albery v. Sessions*, 2 Ohio N. P., 237; *Johnson v. Johnson*, 92 Tenn., 559, 22 L. R. A., 179, 36 Am. St. Rep., 104, 23 S. W., 114; *Heiss v. Murphy*, 40 Wis., 276.

The cases cited by counsel for the trustees have been examined with care, and none is found which can not be reconciled with the

conclusion to which the court is compelled to come by force of the authorities hereinbefore cited and many others considered.

Let us consider briefly most of the cases cited in support of the item: *Umrey, Exrs., v. Wooden et al*, 1 O. S., 160, the syllabus of which lays down the proposition that "No trust shall fail for want of a trustee." The bequest here was to two named executors (who were qualified and acting) for the benefit of the poor and needy of two specified townships, and full discretion was placed in the named executors. Here the will not only particularizes the charity but it is specially protected by statute, "That all gifts * * * and bequests * * * to the poor of any township by will or otherwise shall be valid in law."

Trustees of the McIntyre Poor School v. the Zanesville Canal & Mfg. Co., 9 O., 203, and a later case growing out of the same will in the 17 O. S., 352, the devise was for the purpose of establishing a school for poor children within the town of Zanesville. This item was claimed to be void for uncertainty. The item was sustained. The difference in characterizing the charity there and in the instant case is apparent and the court indicate in the first case, at page 287, the particulars wherein the item we are examining will not stand the test, when they say, "Where a trust is plainly defined and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it."

And the leading case of *Miller v. Teachout*, *supra*, where the residue of the estate was to be appropriated by the executor to the advancement of the Christian religion at his discretion. The executor accepted the trust. The court in the syllabus carefully state, that they are not passing on the question that we have under consideration, when they say:

"The testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its indefinite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this state will not, in advance of that time, interpose * * * to prevent its exercise."

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And early in the opinion, at page 533, the court conclude that a *trust is created* by the language of the Miller will; that the purpose, the Christian religion, is sufficiently definite, and that therefore "No elaborate consideration is required of the much controverted question as to the limits of judicial power that may be exercised by courts of equity over charitable trusts," and note the language immediately following:

"Whenever a trust is established, and the subject of the trust is so certain that it may be known to what it attaches and the *object is so defined* that it may be known who is the intended beneficiary, there is no question whether the trust be to a charitable use or not, but that it is valid. But, however faultless the trust may be in other respects, if it be wanting in *certainty as to its object*, as a general rule, the trust must fail."

As a whole this case is strong authority to sustain the validity of the item under consideration, if O. P. Converse had lived, but careful reading of it certainly strengthens the conclusion of the courts of other states hereinbefore cited, to the effect that a bequest to charity generally, without the presence of some one to exercise the discretionary power granted in the will, must fail.

Grant v. Saunders, 121 Iowa, 80; 95 N. W., 411:

Here the court has under consideration a bequest for the benefit of the poor, a trustee named with power of selection. This case is very similar to the case of *Miller v. Teachout*, but the court go one step further in discussing the law in the event that the named trustee should for some reason later be unable to act. And although they expressly say that "such a contingency has not arisen, nor may it ever arise," they add by way of *gratis dictum* "if it should ever become necessary for the court to appoint another trustee, we see no insurmountable obstacle in the way of its so doing." And this conclusion may be correct for the purpose named in the bequest is much narrower than the field of charity generally.

Other cases cited are very similar to those immediately hereinbefore considered, and none go any further toward widening the

authority of courts over charitable trusts than those specifically discussed.

Although the exact question presented in Item Eleven has not been decided in Ohio, so far as investigation discloses, yet in the light of the adjudication of the courts of other states, wherein the matter has been decided, and the inferential reasoning of the available cases in our state, the law at this time will not permit of the administration of this item, and it is therefore void, in so much thereof as pertains to a charitable trust and the power to administer the same, and the testatrix as to the residue of her estate as described in said item, died intestate.

Further instruction is requested as to the duties of the plaintiff "with reference to the estate of said Sarah J. Johnson, which would go under said Item Eleven, if found invalid, as well as the distribution thereof." The matter of the division of the money and personal effects of the estate will, according to agreement, be deferred to the time of distribution.

The executor having general power to convert the notes of the estate into money, unless otherwise provided, it would seem that since the purpose for which the trustee was authorized to collect the uncollected notes has failed, and if the present trustee did collect them he would have to turn the proceeds over to the executor, and inasmuch as the executor and the trustee are one and the same person—that the feasible plan would be for the executor, as such, to convert the uncollected notes into money and place the same in the general assets of the estate.

Plaintiff further asks instruction of the court as to his duties under Item Twelve of said will, to-wit:

"I do hereby nominate and appoint O. P. Converse of London, Ohio, and M. L. Rea of Madison county, Ohio, executors of this my last will and testament, hereby authorizing and empowering them to compromise, adjust, release and discharge in such manner and upon such terms as they may deem best, all debts due me or claims made against my estate, and I do hereby further authorize and empower my executors to take immediate charge of all of the real estate of which I may die seized whether it be in my name or the name of my deceased husband Richard M. Johnson, to fully carry out any and all leases or rentals therefor, and to

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collect all rents or grain or crops that may be coming to me or my estate therefrom for that rental year which will be to the first day of the month of March following my death, and all such rents or crops that would be coming to me in case of my death not so occurring from any of the tracts of land herein specifically devised shall be divided one half to my estate and the other half thereof to the person to whom said tract of land is so devised, regardless of the time of year at which my death shall occur; and said executors are to continue to manage and control, rent and make leases for any and all of the balance of my said land until such time as they may conclude to and do sell the same as hereinafter provided, the income derived therefrom after paying taxes, assessments and expenses to go into my general estate, with full power to keep up all repairs thereon and to do any and all such other acts or things that they may deem best until so sold as aforesaid. Whether or not, in the division of the rents provided therein collected during the year in which she died, whether it should be the gross rents from said lands, or the net rents after the payment of taxes and expenses, incident to said leases." * * *

The language of the item essential to a determination of its meaning is "and *all* such rents or crops that would be coming to me in case of my death not so occurring * * * shall be divided one half to my estate, and the other half thereof to the person to whom said tract of land is so devised." The rule is (40 Cyc., 1537) that, "Where the income or use of realty is given the presumption is that the net income or profit is meant and that the beneficiary must pay out of the gross receipts all charges against the real estate." But that rule is ordinarily applied where the whole of realty is given or where the language of a will does not expressly show an intent to vary the rule.

This testatrix had a valuable estate, both real and personal. She provided for gifts to many charitable and religious institutions; she undertook to bequeath all the residue of her estate to charity. In the light of her liberal intention it is not contrary to the spirit of the will to conclude that when she said *all* such rents or crops that she meant gross rents and crops. Again, she knew that one-half of all the rents would be in all probability amply sufficient to pay the taxes and expenses incident to the leases. That she did not use the word *all* inadvertently and with-

out thought of taxes and incidental expenses, is indicated further along in the same item in which the provision that we are now considering occurs, in the use of this language, "The income derived therefrom, *after paying taxes, assessments and expenses* to go into my general estate." * * * And with the proof, that the thought of taxes, assessments, etc., was in her mind at the time this item was drafted, it would seem, that if she had expected the specific devisees to bear one-half of the expenses incident to the leases, that she would not have said one-half of all crops, but would have provided that the crops be sold and from the money derived therefrom that the proper deduction of expenses be made.

The gross rents and crops from the lands specifically devised should be divided one-half to the respective devisees, and one-half to the general estate. See *In re Walford et al*, 23 R. I., 455, 50 Atl., 837.

Further inquiry is made by the plaintiff "as to what his duties are as to the sale of the real estate not specifically devised in said will, in the event of the finding that Item Eleven of said will is void. Whether he is still to make the sale of said real estate and divide the proceeds among the parties entitled to the real estate, or, whether said power of sale becomes void and the persons entitled to the real estate would be entitled to the same as realty instead of personalty."

Item Twelve was drawn in harmony with and in conformance to the spirit and intent of Item Eleven, had conditions made possible to effectuate the plan of the item. The necessity and purpose of the sale is indicated in the item, viz., to contribute to the trust fund for charity. This necessity and purpose failing because of the invalidity of Item Eleven, there is left no reason under the will for the sale of the real estate and that power should not be exercised, and the real estate will pass as intestate property.

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**WORKHOUSE GUARD NOT WITHIN EIGHT HOUR
REGULATION.**

Superior Court of Cincinnati.

LEO FRANK IBOLD V. CITY OF CINCINNATI.*

Decided, May 16, 1916.

Municipal Corporations—Duties of a Workhouse Guard in the Nature of those of a Policeman—Nature of His Contract where Employed by the Month—Not Entitled to Over-time.

1. A municipality is not liable, by implied contract, to pay a workhouse guard for extra hours beyond eight hours a day, where said guard accepts said employment by the month, knowing that he is expected to work twelve hours a day, making no objection thereto or demand for extra pay during his employment, and not expecting or intending to claim compensation for extra time.
2. A guard employed at a municipal workhouse is working for the public but is not engaged in a public work within the meaning of Section 221-1 of the ordinances of the city of Cincinnati.
3. The duties of a municipal workhouse guard are substantially those of a policeman, and he will be considered as such for the purposes of Section 221-1 of the ordinances of the city of Cincinnati.

Wm. Thorndyke, for plaintiff.

Chas. A. Groom, City Solicitor, and *Charles Tatgenhorst, Jr.*, Assistant City Solicitor, contra.

GUSWEILER, J.

This cause is now considered on a demurrer raising the question as to whether the facts stated in plaintiff's petition constitute a cause of action.

From the petition, it appears that the plaintiff was employed in the service of the city of Cincinnati as a guard at the municipal workhouse, during the months of October, November and December, 1915, and January and February, 1916; that plaintiff served all during this time for a period of twelve hours each

* Affirmed by the Court of Appeals without opinion, December 13, 1916.

day; that the municipal ordinance fixes plaintiff's salary at \$75 per month. Plaintiff claims he was only bound to work for eight hours each day and that he is entitled to pay for the four extra hours each day during the period of employment. There is no issue on the question of payment of the \$75 per month. The issue here is, can the plaintiff recover pay for the excess hours beyond the eight hours per day which the plaintiff says totals the sum of \$281.25?

Plaintiff cites Section 241, 221-1 and 221-2 of the ordinances of Cincinnati, and claims that under Section 221-1 plaintiff was bound only to work for eight hours a day. However, this ordinance expressly excludes policemen and firemen from its application.

1. It is the opinion of the court that plaintiff working as a guard at the Cincinnati workhouse, is in law to be regarded as a policeman for the purposes of Section 221-1 of the ordinances of Cincinnati as coming within the rule laid down by Judge Price of our Supreme Court in *Bell v. City*, 80 O. S., 1, and therefore, he is not entitled to the relief prayed for in his petition.

2. It is the opinion of the court that Section 221-1 of the ordinances of Cincinnati, as to the eight hour labor limitation has application only to "public work" done by persons and corporations and associations for the city, and not to employees or guards at a municipal workhouse, following the opinion of former Attorney-General Hogan, rendered February 13th, 1914, found on page 283 of the Annual Reports of the Attorney-General of Ohio, Vol. 1, 1914, and 44 N. Y. App. Div., 492.

There is a distinction between "workmen working for the public" and "workmen engaged in public work." A workhouse guard is working for the public, but is not engaged in a public work within the meaning of Section 221-1 of the ordinances of Cincinnati. No one would insist that "public work" in this application includes within its scope all work performed for, in the interest of, or at the expense of the general public. In other words, there is a clear distinction, though the line of demarcation is not easy of definition, between "public work"

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as here used, and "working for the public" or "public employment"—that is, being employed by the public.

In the case of *Ellis v. Grand Rapids*, 123 Mich., 567, is said:

"Public work is distinguished from public department as used in the statutes giving preference to veterans in employment in all public departments and upon public work."

One is an employment by the public, the other an employment upon an object or undertaking having some kind of permanent existence of a structural character and capable of being properly regarded, when completed as of general public interest and utility.

Policemen and firemen are by the terms of the statute specifically exempt from its provision. It will be readily observed, however, that the police and fire departments of municipal corporations are not public works within the definition of that phrase as hereinbefore stated, and hence policemen and firemen would not have been subject to the provisions of Sections 17-1 and 17-2, General Code, *supra*, even though no mention had been made of them in the statutes.

It may be further observed that this statute applies only to workmen. It is not every one who may be engaged in a public service that is subject to the provisions thereof. The distinction between a workman and a public officer is so marked as to avoid necessity of discussion. It is sufficient to say that public officers of the state, or of a political subdivision thereof, are not within the terms of the statute. Aside from the fact that public officers are not workmen they are not generally engaged on work of a structural nature. For these reasons the plaintiff is not entitled to the relief prayed for.

The operation and conduct of a workhouse by a city constitutes the exercise of a governmental and not a ministerial function of power. 80 O. S., 1. The plaintiff, workhouse guard, having accepted employment and having received and accepted his regular pay of \$75 per month, and making no objection or complaint at any time during his employment against work-

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ing for twelve hours, and not expecting pay or intending to claim compensation at that time for extra hours, but delaying until after his discharge and then complaining about pay for extra hours, raises in law no obligation on an implied contract, and plaintiff has no cause of action. *Ry. Co. v. Gaffney*, 65 O. S., 104.

For these reasons the demurrer will be sustained and the petition dismissed.

ALLOWANCE OF MILEAGE TO WITNESSES.

Court of Common Pleas of Hamilton County.

BENJAMIN A. WAYBRIGHT v. HENRIETTA BONNELL.

Decided, December 11, 1917.

Mileage—Review of Legislation in Ohio With Reference to Allowance of Mileage to Witnesses—Ordinarily Witnesses Are Entitled to Mileage for Only One Attendance.

Witnesses living at a distance from the place of holding court are entitled to mileage only once in the same case; but where there is an adjournment of the hearing for a longer period than over night, as from Friday till Monday or some later day, it is within the discretion of the court to make a second allowance of mileage.

Hicks & Hicks and *E. W. Kemper*, for motion.

W. W. Bellew, contra.

GEOGHEGAN, J.

Heard on motion to retax costs.

I have considered the single question as to whether a witness is entitled to mileage for each day's attendance at a trial under the same subpoena, as the other question presented is a mere matter of arithmetical calculation which can be adjusted with the clerk.

In this case a number of witnesses who are entitled to mileage were compelled to attend court over several days. Living in

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the country they returned to their homes each evening and appeared again the next morning. When they claimed their attendance each day the clerk not only allowed the attendance fee, but charged up mileage for each day, and the question now presented is whether or not this mileage for each day should be allowed.

I am of the opinion it should not. I have traced the history of the act allowing fees to witnesses for attendance at court from the act of August 1, 1792, N. W. Territory, Chase's Statute, Vol. 1, p. 136, down to the present day, where it appears in Section 3012, General Code. Originally the witnesses were allowed three cents a mile coming and going; subsequently, the statute did not provide for any mileage, although there were several amendments to the statute increasing the amount of witness fees. By the act of March 16, 1852, 50 Ohio Laws, 119, the statute was amended to read substantially as follows:

"For each day's attendance * * * seventy-five cents and five cents per mile from his or her place of residence to the place of holding said court."

This subsequently appeared as Section 1301 of the Revised Statutes, although in the act of April 8, 1876, 73 Ohio Laws, 180, the words, "and returning therefrom" were added to the statute, but this act was made not to apply to counties having a population of two hundred thousand or more, which I assume was intended to mean Hamilton county. Subsequently, Section 1301 was amended by the act of March 20, 1884, repealing Section 1301, and providing as follows, as amended Section 1301:

"All witnesses in civil cases shall be allowed the following fee: For each day's attendance at the court of common pleas, or other court of record, to be paid by the party at whose instance he is summoned on demand, and taxed in the bill of costs, one dollar, and five cents per mile from his place of residence to the place of holding court and returning therefrom." * * *

This amendment was carried through the various revisions and into the General Code as Section 3012.

From the history of this statute it is apparent that it is not the intention of the Legislature to allow a witness more than one fee for mileage for coming to court and returning home under the same subpoena, unless, perhaps the court has adjourned over a day, in which event a liberal construction would permit the witness to go home and come back again and allow additional mileage for the coming and returning. I have examined the authorities in a great many other states with reference to this matter and find that under varying statutes and even in the absence of statutes but according to the rules of court, witnesses are only allowed mileage once under the same subpoena, and that it never has been held to be the policy of the law that a witness might return home each day and charge up mileage for his coming and going. Of course, there can be very little gained by the examination of authorities outside of this state, owing to the difference in the character of statutory construction, but it seems to me to be in accord with the general history of the legislation upon this subject that witnesses are only to be allowed mileage once in the same case. If this works a hardship on witnesses, it is the fault of the lawyers who subpoena them and keep them in attendance at court, without using them, from day to day. A little care on the part of lawyers might result in witnesses only being called when they are needed and the difficulty we have here avoided.

The motion to retax costs, therefore, in this respect will be granted, with the provision however, that if any witnesses were called back on Monday after the Friday adjournment, they will be allowed mileage for coming back on Monday under orders of court.

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CONTROVERSY AS TO OWNERSHIP OF STOCK.

Common Pleas Court of Hamilton County.

WILLIAM H. DURRETT V. THE BELLEVUE BREWING COMPANY ET AL.

Decided, April Term, 1919.

Husband and Wife—Ownership of Stock Standing in Name of Insane Husband Claimed by Wife—Jurisdiction.

A controversy as to whether certain corporate stock belongs to the wife or to her insane husband is within the jurisdiction of the court of common pleas.

Littleford & Ballard for Mrs. Klotter.*Galvin & Bauer* and *Renner & Renner*, contra.

DARBY, J.

This action is before the court upon the answer to Lydia Klotter, in which she claims to be the owner of certain stock in the Bellevue Brewing Company, which, however, on the records of the company stands in the name of her husband, Eugene W. Klotter; and also upon her cross-petition against plaintiff and certain defendants to recover upon an alleged contract entered into between all of the stockholders and pledgees of the stock of the brewing company, by which said contract she was to receive \$100 a month for her support and maintenance out of the proceeds of the operations of the brewing company.

The first point to be discussed is a demurrer filed by the brewing company to the said answer upon the ground that the claim of Mrs. Klotter is to stock standing in the name of her husband, an insane person, and whose guardian she is, and, therefore, that this court has no jurisdiction of the subject-matter.

It is the claim of the demurrant that General Code, Section 10492, gives to the Probate Court exclusive jurisdiction concerning the administration of the estate of the insane person, and, therefore, that the determination of the rights of the wife to this stock can not be made by this court.

Not disputing the general proposition that the Probate Court has exclusive jurisdiction in certain matters, it must be kept in

mind that the answer claims certain stock of the brewing company to belong to Mrs. Klotter.

This action was instituted by the plaintiff to recover certain money due from the brewing company. The brewing company admitted the debt and answers and cross-petitions were filed by other defendants, resulting in the appointment of a receiver and the operation of the brewing company for sometime thereafter. An order was made by this court on July 22, 1918, confirming the report of the receiver and distributing proceeds, etc. A judgment for a large sum of money was given against Mrs. Klotter, as guardian of her husband, in favor of other defendants. The concluding paragraph of this order reserves for further consideration the claims of Lydia G. Klotter, guardian and individually, as set up in her answer and cross-petition in this case. All of the debts of the brewing company were paid and the distribution which has been ordered is to the stockholders of a certain dividend, and Mrs. Klotter is now claiming the dividend upon the forty-two shares of stock referred to in her answer.

The real question then to be determined, so far as this claim is concerned, is, as to whether Mrs. Klotter is the owner of this stock, and it would seem that the cause being generally before this court and within its jurisdiction, that there is no propriety in the suggestion that the Probate Court should first determine her rights to the stock before this court can make a distribution.

The demurrer to said answer will therefore be overruled.

The second question for consideration is upon the merits of the answer of Mrs. Klotter.

It must be kept in mind that Mrs. Klotter is the guardian of her husband, in whose name this stock stands on the books of the brewing company, and her claim is therefore adverse to him, and under General Code, Section 11495, she is not a competent witness except as to the specific matters set forth by way of exceptions.

Briefly stated, the evidence was that some time in November, 1911, Mrs. Klotter and her husband went to the office of Judge

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Littleford, in the First National Bank Building. At that time there was an action for alimony pending at the suit of Mrs. Klotter against her husband, in which Mr. Stanley E. Bowdle was her counsel and Judge Littleford represented Mr. Klotter. Upon going into his office Mrs. Klotter stated, in the presence of Judge Littleford and her husband, that they had been at Mr. Bowdle's office to see him but he was not in and they had therefore come to Judge Littleford's office. She further stated that they had entered into an agreement of reconciliation, a condition of which was that Mr. Klotter was to transfer to her the stock named in the answer to protect her in case of further trouble between her and her husband, and that the case was to be dismissed. Mr. Klotter assented to this statement of his wife, and, having with him the stubs of the stock-book, he wrote upon certain stubs: "This stock belongs to Lydia G. Klotter." Mrs. Klotter then stated that she had the certificates and Mr. Klotter said that that was true.

Judge Littleford was called to prove the facts above stated, and, though objection was made to his testimony on the ground that he was counsel for Mr. Klotter, he was permitted to testify to said statements and the actions of Mr. Klotter upon the theory that what was said and done at the time referred to were not communications made to him by his client in the relation of attorney and client, and that in no event could the statement made in his presence by Mrs. Klotter, who was not his client, be a privileged communication, and the evidence was admitted upon the further ground that the presence of the adverse party showed that what was said and done was not intended to be nor considered by any of them as privileged communication.

The testimony given by Judge Littleford further was that at the hearing in the United States Court, in a proceeding against the brewing company, in which Eugene W. Klotter was a party, the stub-book referred to was exhibited and that the writings upon the stubs made by Mr. Klotter, as before testified to, had been erased. He further testified that Eugene Klotter was a witness at that hearing and was asked why he erased the entry on the stubs and he said: "Because he had— some-

thing to the effect 'because I took the stock back.' That was about what he said." The stub-book was offered in evidence and bears evidence of erasure upon each one of the stubs referred to by the witness.

No other evidence was offered on behalf of Mrs. Klotter upon this claim.

The evidence offered on behalf of the brewing company was that though this alleged transaction occurred in 1911, the stock had never been transferred to Mrs. Klotter on the books of the company, neither had she ever voted the stock at any meeting of the stockholders. No dividends on said stock were paid to her.

If Mrs. Klotter actually had the certificates at the time of the transaction in Judge Littleford's office she returned them to her husband because the evidence is that he used them to borrow money thereafter. His statement in the United States Court was that he had made the erasure of the writing because he had "taken the stock back." There is no explanation in the record as to how he "took the stock back," the terms, conditions or agreement under which it was done, but simply the fact that he took it back, and the fact that he afterwards borrowed upon it shows clearly that he did have it in his possession. During all of this time Mr. Bowdle was attorney for Mrs. Klotter and his testimony was that she at no time exhibited to him any certificates of stock, and there is no evidence of any claim that Mrs. Klotter at any time requested a transfer to her of the stock. Mr. Bowdle testified that he prepared an income tax return for Mrs. Klotter, as guardian, on or about March 27, 1916, in which was included the total dividends paid on all the stockholdings in the brewing company held by Eugene Klotter, including the shares now claimed by her. Mr. Bowdle testified that the details for this report he secured from the secretary of the brewery and that Mrs. Klotter afterwards came in and swore to the return. There was also offered in evidence the inventory in the estate of Eugene W. Klotter, in the Probate Court, filed March 30, 1916, and also prepared by Mr. Bowdle. This inventory includes

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nine hundred and eighty-three shares of stock in the brewing company, which, of course, includes the part now claimed by Mrs. Klotter, but, as part of that inventory, appears the following by way of explanation:

“A portion of said stock being also subject to a claim of ownership by this guardian, who is the wife of said ward.”

Mrs. Klotter, testifying under the first exception to Section 11495, General Code, as to facts which occurred after the appointment, admitted signing the tax return and inventory, but stated that they were prepared for her by her counsel, in whom she had confidence, and she signed them because he instructed her to do so. It will be observed, however, that in return and the inventory were made after her appointment as guardian.

Mrs. Klotter's statement to Judge Littleford that she wanted this stock to protect herself against her husband's future actions is entirely inconsistent with her failure to have the transfer made; the redelivery certificates to him to use as he might see fit under some plan or contract not shown to the court, and the receipt by him of the dividends on this stock, contradicts her claim of ownership.

Upon a consideration of all the facts in the case, as outlined above, the court is unable to reach any other conclusion than that there is not sufficient evidence to sustain the claim of Mrs. Klotter that this stock belongs to her, and judgment will be entered against her upon her answer.

Next, the brewing company and the receiver filed a demurrer to the answer and cross-petition of Mrs. Klotter, upon the ground that it did not state facts sufficient to constitute a cause of action.

The cross-petition prays that—

“The receiver be ordered, in distributing the assets of the corporation, to pay out of the assets in his hands to this petitioner the said sum of sixteen hundred (\$1,600.00) dollars, with interest as aforesaid, and if there should not be sufficient assets to pay said claim in full that personal judgment be given her against the other defendants and the plaintiff for the said sum of sixteen hundred (\$1,600.00) dollars, with interest as afore-

said, or any unpaid balance thereof, and for such other relief as is proper."

The agreement referred to was signed by all of the stockholders and pledgees of stock of the brewing company.

It seems that there had been considerable litigation in the United States court of this district and that during said litigation Mrs. Klotter was appointed guardian of her husband. She was not employed by the brewing company and had no claim against it. The records indicate that her husband had become insane and was in an asylum. She held no stock in the company in her own name and had no claim of being a stockholder except as to the forty-two shares hereinbefore referred to. Toward the end of this litigation the agreement was signed and contained this provision:

"4. During the period of the employment of said Osterfeld (as superintendent) the revenues derived from the operation of said brewery shall be applied as follows:

(a) To the payment of the operating expenses thereof, including the sum of one hundred (\$100.00) dollars per month to Lydia Klotter, Guardian of Eugene Klotter, for her maintenance and support."

Then follows other agreements as to the operation of the company. Thereafter Mrs. Klotter was regularly paid the sum of \$100 a month until the board of directors of the brewing company directed the manager to discontinue such payments. Mrs. Klotter now seeks judgment for \$1,600, claimed to be due her at the rate of \$100 a month under said agreement.

It is the claim of the brewing company that the so-called agreement or contract was without consideration and is unenforceable. On the other hand, Mrs. Klotter's claim is that the consideration of the United States court and the return of the company to the control of the stockholders, thus getting rid of the receivership which was then pending in that court.

As stated, Mrs. Klotter rendered no services to the company of any kind. She had no interest in the litigation. Covering the year ending about the time of this agreement she received, as guardian, upon the stock of her husband in the brewing com-

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pany, some \$33,000 out of which, of course, she was entitled to her support.

The court is unable to find that there was any adequate consideration for this contract to pay Mrs. Klotter \$100 a month, and the board of directors was clearly within its rights in ordering a discontinuance of payments.

The cross-petition of Mrs. Klotter will, therefore, be dismissed.

**IMPROPER JOINDER OF PARTIES IN ACTION BY AN
INJURED EMPLOYEE.**

Common Pleas Court of Hamilton County.

CLARENCE MCCORMICK V. THE HIPPODROME AMUSEMENT CO. ET AL.

Decided, January Term, 1919.

*Negligence—Misjoinder of Parties Defendant—Master and Servant—
—Action by Employee for Injuries.*

A joint action by an injured employee does not lie against the two corporation owning the property on which the accident occurred, the president of one of these companies and the contractor who was doing the work.

Heard on demurrers to petition.

Galvin & Galvin and Pogue, Hoffheimer & Pogue, for several demurrers.

L. J. Crawford, of Newport, Kentucky, and *J. W. O'Hara*, contra.

GEOGHEGAN, J.

This is an action for negligence, in which the plaintiff has joined as defendants the Hippodrome Amusement Company, the Ante-Frankel Amusement Company, Isaac Frankel and Edward A. Curry. The negligence alleged is that Curry failed to properly secure the framework of a certain window in a theater that had been constructed and was owned by the defend-

ant corporations, and that the defendant, Frankel, who was president of the companies, directed the plaintiff to do certain work in and about covering this window opening, and that in doing the said work he took hold of the frame work to support himself and it gave way.

There is no charge that the defendant, Frankel, nor anyone else connected with the amusement companies knew anything about the condition of the window frame and if there is any negligence set forth in the petition it can only be the negligence of Curry in improperly doing the work of putting in the window frame.

Separate demurrers were filed by each of the defendants on two grounds, the first being that there is a misjoinder of parties defendant, and, second, that the petition does not state facts sufficient in law to constitute a cause of action against the defendants.

It appears upon the face of the petition that there is a misjoinder of parties defendant. The statement of what is contained in the petition must make it apparent that the doctrine laid down in *French, Admr., v. Central Construction Company*, 76 Ohio St., 509; in *Clark v. Fry*, 8 Ohio St., 358; and in the recent decision of the Court of Appeals of this county in *Cordes, Admr., v. Doepke et al*, is applicable here, and that therefore the demurrers should be sustained on the ground that there is a misjoinder of parties defendant.

Having taken this view, therefore, the court refrains from passing upon the questions raised by the second ground of the demurrers.

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CONSTRUCTION OF RULE COVERING DEMURRAGE CHARGES.

Common Pleas Court of Hamilton County.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD CO. v.
THE PROCTER & GAMBLE CO.

Decided, 1913.

Rule—Promulgated by a Carrier and Fixing Demurrage Charges—Construed in Accordance with the Plain Meaning of the Words Used—And Not in Furtherance of the Evident Purpose of the Carrier.

A rule embodied in a freight tariff, with reference to the charge to be made for use of cars not unloaded within forty-eight hours, will be construed in accordance with the plain and obvious meaning of the words employed, notwithstanding the purpose of the carrier was manifestly to fix a different charge from that so obtained.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff.
Paxton, Warrington & Seasongood, contra.

GORMAN, J.

Decision on submission on agreed statement of facts.

Section 11472 of the General Code provides that parties to a question which might be the subject of a civil action, on filing an affidavit that the controversy is real and the proceedings in good faith to determine their rights, may agree upon a case containing the facts upon which the controversy depends and present a submission of it to any court of competent jurisdiction, which shall hear and determine the case, and render judgment as if an action were pending. By the provisions of Section 11473, General Code, the case, the submission and the judgment shall constitute the record, and by the provisions of Section 11474, the judgment shall be with costs, may be enforced, and shall be subject to reversal in like manner as if it had been rendered in an action, unless otherwise provided in the submission.

The controversy between the parties arises over the construction to be given to the part of Rule 10 of its local freight tariff under the caption of "a" which reads as follows:

"(a) If any patron elects, the carrier will enter into an agreement with him to apply the average plan for the determination and settlement of demurrage charges, the basis of the average to be forty-eight (48) hours, fractions of days not to be taken into account, a credit of one day to be given on each car released within twenty-four (24) hours and a debit of one day to be charged against him for each car detained beyond forty-eight (48) hours, not more than seven days credit to be applied on any one car; balances to be closed at the end of each calendar month, neither debits nor credits to be carried over into the next month."

It is contended by the plaintiff in the case that the true intent and meaning of this part of Rule 10 is that when a car is held beyond the forty-eight hours time limit, provided for in the rule, and is subject to demurrage charges, there shall be charged against the party detaining the car a debit for each day of twenty-four hours that the car is held after the expiration of the forty-eight hours provided for in the rule; while it is the contention of the defendant company that where a car is held beyond the forty-eight hours provided for in the rule there shall be charged against the person or corporation holding the car but one day's debit, regardless of the length of time the car is held after the expiration of forty-eight hours.

Now the language of the agreement specially under consideration reads as follows:

"A credit of one day to be given on each car released within twenty-four (24) hours, and a debit of one day to be charged against him for each car detained beyond forty-eight (48) hours, nor more than seven days credit to be applied on any one car; balances to be closed at the end of each calendar month, neither debits nor credits to be carried over into the next month."

The credit to be given to the shipper who receives the car is for the release of a car within twenty-four hours after it has been received and placed on the siding.

This part of the rule was obviously intended to encourage the shipper to release cars as soon as possible after they had been received by the consignee, as the railroad companies evidently considered the car was more valuable in use than lying idle as a warehouse on the siding of the shipper, and therefore, while the shipper was allowed forty-eight hours time after the placing of the car within which to unload and free the car, nevertheless the railroad company was offering a premium to the shipper if he released the car within twenty-four hours after receiving it.

This provision of the rule would operate to the mutual benefit of the carrier and the shipper and there is no question between the plaintiff and the defendant as to this part of the rule.

The controversy arises over the succeeding language of the rule, which reads as follows:

“And a debit of one day to be charged against him for each car detained beyond forty-eight (48) hours, not more than seven days credit to be applied on any one car.”

Now it is manifest that the meaning of this language is, that there shall be a debit of but one day charged against the consignee or shipper for detaining a car beyond the forty-eight hours limit. The language is not susceptible of the meaning that there is to be a debit of one day for each twenty-four hours which the car is detained beyond the forty-eight hours. The court has no doubt that is what the carrier intended to provide in the rule, but by an oversight, or neglect, or misapprehension, it was not so stated in the rule.

It is contended, however, by counsel for the plaintiff that the words “not more than seven days credit to be applied on any one car” are superfluous and unnecessary unless they be taken in connection with the words preceding this clause. It is claimed that this language, in connection with the words immediately preceding it, indicate clearly that if there is to be but one day charged for the detention of a car beyond the forty-eight hours free time allowed, however long the car may be detained, then there can be no case in which the limitation of seven days credit shall be applied to any one car because a car could only be debited

for one day and would therefore never be entitled to more than one day's credit.

There is great force in this claim of the plaintiff, and if it were not for the plain words employed immediately preceding this clause, the court would be in accord with the contention of plaintiff's counsel that this language contemplated that there should be more than one day's debit charged against a car for its detention beyond the free time; but the court can not make contracts for the parties. Notwithstanding the fact that the court is of the opinion that the railroad company contemplated and intended to make a charge or debit against the holder of the car for each twenty-four hours it was held beyond the forty-eight hours free time, nevertheless, being called upon to construe the language of the rule, which is the contract between the parties, the court does not feel at liberty to interpolate into the rule language which was not incorporated therein by the parties themselves.

It is contended, however, that the Public Service Commission of Ohio interpreted this rule to mean what plaintiff's counsel claims it means. But shippers are not bound by an interpretation made by the Ohio Public Service Commission, nor is the court bound by the interpretation which is placed upon the rule by said commission. Furthermore, the construction laid down by the Public Service Commission of Ohio as to the meaning of this rule was in an *ex parte* proceeding, to which the defendant, the Procter & Gamble Company, was not a party and was not therefore concluded or bound by the finding of the commission.

The court is of the opinion that the plaintiff company took the view that this rule was subject to the construction claimed for it by the defendant company, because it appears from the record—the agreed statement of facts—that subsequent to the date of the order of the Public Service Commission of the state of Ohio, construing this rule, the plaintiff company filed a petition in the Court of Common Pleas of Franklin County, wherein, among other things, the plaintiff company and other railroad companies alleged that Rule No. 10, now under consideration, is

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unreasonable in not providing for a debit of one day for each twenty-four hours or fraction thereof a car is detained beyond forty-eight hours. This would appear to be a very strong admission against the plaintiff in this case.

It further appears from the agreed statement of facts that about September 12, 1912, the Public Service Commission of Ohio, after a public hearing, ordered the plaintiff company to amend said Rule 10, now under consideration, and in pursuance of said order the plaintiff company issued its local freight tariff on September 20, 1912, to be effective October 1, 1912, and known as the car demurrage rules, covering said Rule 10, and amended said Rule 10 so as to conform with the ruling of the Public Service Commission of Ohio, made on October 6, 1910, which ruling provided that there should be a debit or charge of one day for each twenty-four hours which a car was held beyond the free time of forty-eight hours.

The court is of the opinion that all these matters shown in the record indicate that the plaintiff company, to say the least, saw that the construction of Rule 10 such as is contended for by the defendant company in this case would be claimed by the shippers and therefore took steps to amend the rule so as to avoid any ambiguity.

There is no question in this case about any cars being detained after October 1, 1912, but the controversy arises over cars that were detained by the defendant company prior to October 1, 1912, to-wit: cars detained in the months of June, July, August and September, 1912.

The aggregate amount claimed by the plaintiff company for these detentions amounts to \$138, and is arrived at by debiting or charging the defendant company the sum of \$1 for each day of twenty-four hours which the cars were detained beyond the forty-eight hours free time.

The defendant company admits that \$6 is due and payable under Rule 10, as construed by it, and this amount is arrived at by debiting itself or charging itself with one day's charge or debit on each car detained beyond the forty-eight hours free time, regardless of the number of days it was held, and there

being six cars held beyond the free time the total amount which it claims to be due is \$6.

The conclusion of the court is that the language of Rule 10 under consideration, and which is the subject of the controversy between the parties herein, means that the defendant shall be charged or debited for one day on each car beyond the free time of forty-eight hours, regardless of the number of days it was so detained, and that therefore the amount claimed by the plaintiff in this case is not the correct amount due, but that the amount due is the amount admitted by the defendant to be due for the detention of the plaintiff's cars.

This conclusion is not, perhaps, as satisfactory as it might be because of the doubt arising from the use of the language, "Not more than seven days credit to be applied on any one car," but in view of the plain words employed in the rule immediately preceding this language, the court is unable to see how it can construe the language to be other than the plain import of the words indicate.

The judgment of the court, therefore, is, that the plaintiff recover from the defendant the amount of \$6, and this being a case in which the parties might very well disagree, the court is of the opinion that the costs of this action should be paid—one-half by the plaintiff and one-half by the defendant.

Judgment may be entered accordingly.

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**DISCRETION IN THE ORDERING OF A SIDEWALK
IMPROVEMENT.**

Superior Court of Cincinnati.

ELEANOR MITCHELL v. CITY OF CINCINNATI.

Decided, April 27, 1918.

*Sidewalks—Discretion Exercised by Council—In Ordering Sidewalk
Improvement—May Not be Interfered with by the Courts, Unless.*

Members of council are the sole judges of the propriety as well as the necessity of a sidewalk improvement, and their decision when not transcending their powers nor induced by fraud or manifestly an abuse of discretion is not subject to judicial revision.

Dickerson, Black & Dickerson, for plaintiff.

Saul Zielonka, Frank K. Bowman and Clifford Cordes, contra.

GUSWEILER, J.

This is an action for injunction against the city of Cincinnati brought by the plaintiff, owner of thirty-five feet of realty on the south side of Martin street, Cincinnati, being numbers 957 and 959. The action is to prevent the city enforcing its order regularly passed, to construct a sidewalk of cement paving in front of said premises.

The plaintiff claims that there is now in front of said premises a good brick sidewalk, full width, well constructed and suitable in all respects for the passage of pedestrians, and that it is unnecessary to replace the same with a new sidewalk, and that the present brick sidewalk will be servicable for a long time to come. The city by answer pleads a general denial.

The case was heard on its merits and we find after careful consideration of all the evidence that the facts do not justify plaintiff's contention. We find the evidence to disclose that this sidewalk at No. 959 has a hole from the curb to the center of the walk, approximately 5 ft. x 5 or 6 ft. where the bricks are

missing; that the bricks on both walks are worn unevenly and irregularly; that these walks are not good, are not properly constructed and are not suitable for pedestrian use.

On the facts we fail to find the requirement unreasonable, unjust or any manifest abuse of discretion on the part of the city in its passage or enforcement of the order herein involved.

It is contended by plaintiff that plaintiff could at small expense place these sidewalks in good condition with new brick, etc. We believe that the condition of both sidewalks necessitate their having to come up and new walks put down. However, as a matter of law, we are of the opinion that a municipality has discretionary authority by ordinance through its council to legislate on this question and that equity will not be justified by injunction to restrain the enforcement of an order for sidewalk improvements or changes, unless it is clearly proven that there was manifest abuse of discretion amounting to bad faith.

Members of council are the sole judges of the propriety as well as the necessity of an improvement and their decision when not transcending their powers nor induced by fraud or manifestly an abuse of discretion, is not subject to judicial revision. *Ry. Co. v. Defiance*, 52 O. S., 262; *Dillon on Municipal Corporations*, Sections 94, 95, 868; *Beach on Public Corporations*, Section 1205, 1112, 1118; *High on Injunctions*, Section 1270; *General Code*, 3582 to 3870.

Even if we were to admit what plaintiff says as to the present sidewalk conditions we are nevertheless of the opinion that there exists no evidence of abuse of discretion on the part of the city as was found in *Livingston v. Cincinnati*, 22 C.C.(N.S.), 383; *Ditmers v. City of Columbus et al*, 2 N.P.(N.S.), 657.

It follows that the petition of the plaintiff must be dismissed at plaintiff's costs.

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PREFERENCES TO EMPLOYEES OF INSOLVENT CONCERNS.

Common Pleas Court of Clark County.

H. E. MYERS ET AL V. THE ENSIGN MOTOR CO.*

Decided, 1918.

Liens—Class of Employees Entitled to Preference—Not Different under Section 8339 from Section 11138—Automobile Salesmen Not Entitled to Preference.

1. It was not intended by the Legislature, by its use in Sections 8339 and 11138 of different definitions of the employees of an insolvent debtor who are entitled to preference in the payment of claims, to enlarge the class of persons to whom the provision is applicable or to provide preference for different classes. These statutes are *in part materia*.
2. Automobile salesmen who operated for an insolvent concern within prescribed territory are not entitled to preference in payment of their claims for services, notwithstanding their duties included the performance of some manual labor around the garage.

Stafford & Arthur and John M. Cole, for plaintiff.

A. J. Todd, contra.

GEIGER, J.

Minor T. Ballentine and Clarence A. Ballantine each present a claim which they ask be allowed as a preferred claim against the funds in the hands of the receiver of the Ensign Motor Company.

The claim of each arises out of services performed as automobile salesmen in the employ of the insolvent corporation. All the services were performed within three months of the appointment of the receiver. Minor T. Ballentine's employment was that of a general agent for the sale of automobiles within his territory, which included several counties, and for a portion

* Affirmed by the Court of Appeals for Clark County, by which court the claims were rejected as preferred claims under the statute, but a portion of one claim was allowed for equitable reasons not involved in the above opinion.

of the time for which he claims wages, he was general manager of the company.

Clarance A. Ballentine, under his contract, acted as a salesman operating in any territory within the district controlled by Minor T. Ballentine. He was required to furnish his own demonstrating car and pay his own expenses.

Each of these claimants performed minor manual services incident to the operation of the garage owned by the defendant corporation, but they were employed as salesmen, and their compensation was fixed upon a per cent. of the sales made by each.

It is stated by counsel that they claim that the wages due to these employees are preferred by virtue of Section 8339, G. C., and not by virtue of Section 11138, G. C., both of which relate to preferred claims against insolvent debtors.

Section 8339, G. C. provides, in substance, that laborers and employees, whether such employment be at agriculture, mining, manufacturing or other manual labor shall have a lien upon the real property of their employers, and further, that in all cases when property of the employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within a period of three months prior to the time such assignee is appointed, etc., shall be first paid out of the trust fund.

It is urged that both of these claims come within the provisions of this statute, and a number of cases are cited which seem to justify the claim.

It is recognized in various decisions that this statute covers two conditions that may exist in reference to the property of an insolvent.

The first part of the statute is applicable where there is real estate of the insolvent; the second part, above cited, applies when there is no real estate.

The Supreme Court, in the case of *St. Marys Machine Co. v. National Supply Co. et al.*, 68 O. S., 535, says on page 539:

"As there was no real estate in this case, the only part of the section applicable here is the following," which is the part last above cited,

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If by the statement of the court in the Machine Company case, that only a part of the statute applies where there is no real estate, we are confined to "claims due for labor performed within a period of three months" our inquiry would be confined to determining whether the service of the salesmen is included within the meaning of the word "labor."

Admitting however, for the time, as claimed by counsel, that the first part of the statute applicable to a case where there is real estate, is to be considered, we are to determine whether "laborers and employees, whether such employment be at agriculture, mining, manufacture or other manual labor," correctly describes the class occupied by these claimants in reference to the insolvent company.

The case most relied upon by claimants is that of *Lewis v. Dawson*, 6 C. C., 243, in which it is held that a salesman employed at a fixed salary per month and a per cent. on all the sales made by him, is an employee of the company within the meaning of Section 8339, G. C., and entitled to a preference on his claim as therein provided.

The court, in speaking of the provisions of Section 8339, G. C., says:

"There are evidently two classes of persons designated in the statute, 'laborers' which may perhaps only be intended to mean such as 'work with their hands'; and 'employees,' to include any person employed to perform any services, whether manual or otherwise, necessary to be performed in and about the business in order to make it a success, and both entitled to the preference of the statute."

The court in that case seems to have lost sight of the fact that the statute uses the words "laborers and employees, whether such employment be at agriculture, mining, manufacturing or other manual labor," and that it also uses the expression, "claims due for labor performed."

If the court was correct in interpreting the word "employees" to mean any person employed to perform any service, whether manual or otherwise, the door would be opened for all persons who do anything for compensation, or who are employed in

any manner by the insolvent, to secure preference for their claims.

In the case of *Hanner v. Maumee Brewing Co.* 6 O. N. P., 305, it was held that the wages of a traveling salesman are entitled to preference, and the court seeming somewhat reluctantly to follow the case of *Lewis v. Dawson*, 6 C. C., 243, says:

"So far as Pringle is concerned"—a salesman upon the road—"I only have this to say: that the decision of the circuit court in Cincinnati is directly in his favor and it is not within the proper province of this court, there being no decision of the circuit court directly against it, to overrule that decision, and Mr. Pringle's claim will be allowed."

A very interesting opinion is that rendered by Hon. John C. Miller, late of this court, in the case of *Akron Iron Co. et al v. Whitely Co. et al*, 25 W. L. B., 203. The court says:

"The logical conclusion therefore is that the claims of the employees of the William N. Whitely Company for labor performed by them, either in the shop or office; either at home or abroad; either in setting up machines in the field or in selling the same; either resident or non-resident of the state of Ohio ought to be paid in full."

However, the court's decision was based upon the fact that the receiver was to continue the operation of the plant, to which the various employees had contributed by their skill and labor, on the theory that courts of equity may make it a condition of continuing to operate an insolvent corporation, that the arrearages of claims of those who have by their labor contributed to the assets which go into the hands of the receiver, shall be paid out of the first net assets of the receivership.

In the case of *Northern Ohio Gas Appliance Co. v. Hallett*, 16 C.C.(N.S.), 342, it is held that a salesman may have an attachment on the ground that his claim is one for work and labor, and the court refers to and follows the case of *Lewis v. Dawson*, *supra*. But upon reading the case it appears that no question is made upon the point that a traveling salesman does not technically perform work and labor, the holding being

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directed to the point that a person whose wages consist of commissions on goods sold, is entitled to the same protection as one who labors at a fixed wage.

The Supreme Court, in the Machine Company case, 68 O. S., 535, in speaking of Section 11138, G. C., says:

“It is *in pari materia* with said Section 8339, G. C., and both sections must be read and considered together.”

Statutes are *in pari materia* which relate to the same person or thing, or to the same class of persons or things, and statutes which are *in pari materia* are to be considered as though they had originally constituted one enactment.

Further discussion in reference to the differences and similarity of these two sections may be found in *In Re City Trust Co.*, 121 Fed., 706, *In Re Laird*, 109 Fed., 550; both decisions by Judge Day.

Section 11138, G. C., instead of using the term “laborers and employees” uses the phrase “each person who has performed labor as an operative in the service of the assignor.”

It is quite difficult to arrive at the conclusion that these two statutes in the different definitions used intend to give preference to a different class of persons. Section 8339, G. C., defines the persons whose wages are to be preferred as “laborers and employees, whether such employment be at agriculture, mining, manufacture or other manual labor,” and further on the statute uses the phrase “for labor performed.” Section 11138, G. C., uses the phrase “each person who has performed labor as an operative.”

The claimant, as stated in the Machine Company case, should be allowed to invoke the provision most favorable to himself, both as to the description of his services, and as to the length of time and the amount which the preference should cover.

If it be true that the class of labor provided for in these two sections can not be distinguished, and that the two sections are *in pari materia*, the case of *In Re Assignment of William M. Sloan*, 60 O. S., 472, seems to be of decisive importance.

In that case it is held that one who is employed by a publisher of a legal directory as traveling agent, in obtaining subscriptions

and selling the directory to attorneys and others and collecting accounts, is not an "operative" within the meaning of Section 11138, G. C.

This case was originally decided under the title of *David Davis, Assignee of William Sloan, v. Greenlee*, 13 O. C. C., 229. The court, on page 231 says:

"While we are not disposed to place a very strict construction upon this language as used in this statute, and, in view of what we deem to be the purpose of the Legislature in its enactment, viz: to protect and prefer the claims of those who, as workmen or laborers, serve their employer in the house, field, factory or mine, or in other like services, would be strongly inclined to be liberal in the construction to be placed upon it, yet we are of the opinion that on the admitted facts of this case, it can not rightfully be said that Mr. Greenlee performed labor as an 'operative' in the service of Mr. Sloan."

The court says that the common acceptance of the words operative, laborer and workman, is the correct one, and that the statute was not intended to give a preference to every person who had performed labor of any kind for the assignor within the period prescribed.

"If so, the lawyer who may have tried a case for him, or the physician or surgeon who may have rendered him service in the line of their profession, must be considered as 'operatives'; for it is only when the service is rendered as an operative that the statute applies, and this could not have been the intention of the Legislature."

The Supreme Court, in the review of this case, 60 O. S., 472, says:

"We agree with the conclusion reached by the circuit court. The applicant is not an operative within the meaning of the above section."

In 37 Law Bulletin, page 257, will be found the following editorial note:

"The question whether a traveling salesman can claim a prior lien for salary due, under Section 6355, R. S. (11388, G. C.), which gives 'operatives' a preference for their claim for wages

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due in cases of assignment for benefit of creditors, came before the Circuit Court of Franklin County last week, and the court held that a traveling salesman is not an operative within the meaning of the section, following a decision on the same question of the Circuit Court of Hamilton County, in *Davis v. Greenlee*, 13 C. C., 229."

This court, in the case of *Houston v. Houston* held that clerks in a grocery store were entitled to preference for their wages.

The court is by no means inclined to hold that all those engaged in selling goods are not within the provisions of the statute, as very frequently salesmanship by clerks in stores calls for great manual labor, as for instance, those selling groceries or hardware.

It was held that clerks in a jewelry store were entitled to preference. *In Re Assignment of Duhme Co.*, 4 O. N. P., 294.

See also, as throwing light upon these statutes: *In Re Assignment of Lowery*, 4 O. N. P., 395; *In Re Assignment of Fairview Glass Co.*, 9 Ohio N. P. (N.S.), 157; *Green v. Weller, Assignee*, 6 C.C.(N.S.), 351; *Trust v. Miami Oil Co.*, 19 C. C., 727.

These statutes are also interestingly discussed by the Federal Court in *In Re Crawford Woolen Co.*, 218 Federal Rept., 951; *In Re Greenwald*, 99 Federal Rept., 705.

In the last cases mentioned, it is held that a traveling salesman is not entitled to preference under similar statutes.

The court has gone at some length into the discussion of this question, for the reason that it is of considerable importance to these claimants, as well as for the reason that these statutes had been enacted for the preference of a certain class of creditors and should receive the most liberal construction, and also because a different construction has been placed upon them by a number of lower courts.

It however appears to the court that in Section 8339, G. C., it is required that a person, in order to be entitled to its beneficial protection must be a laborer whose duties call primarily for the exercise of manual labor in some form.

It is definitely held in *In Re Assignment of Sloan, supra*, that a salesman is not one who performs labor as an operative, and

the same reasoning leads to the conclusion that a salesman performing like service is not a laborer or employee engaged in manual labor, and this is true even though he performs some manual labor incident to his employment as a salesman, and the claims will be rejected as preferred claims. ,

PRISONER COMMITTED ON A DEFECTIVE MITTIMUS.

Common Pleas Court of Licking County.

**IN RE APPLICATION OF WILLIAM A. OSBORNE FOR A WRIT
OF HABEAS CORPUS.**

Decided, April Term, 1918.

*Habeas Corpus—Does Not Lie for Release of a Prisoner—Committed on
a Defective Mittimus.*

On application for release of a prisoner by habeas corpus, on the single ground that the mittimus issued by the mayor who committed him was not properly filled out, a writ will be denied and opportunity given to said mayor to amend his mittimus.

L. C. Russell, for applicant.

James M. Schaller, Assistant Attorney-General, contra.

FULTON, J. (orally).

William A. Osborne was tried and convicted for illegally trafficking in intoxicating liquors by the mayor of Hebron. He was fined \$100 and \$30 costs, and was ordered to stand committed until the fine and costs were paid, or secured to be paid, or he was otherwise discharged by law. Error was prosecuted to this court from the action of the mayor, and the court affirmed the judgment. The applicant, Osborne, was committed to jail, having failed to comply with the order of the court and pay one hundred dollars and the costs. A writ of habeas corpus has been filed, seeking to liberate him from the jail for one reason alone. That is because the writ, or mittimus, which was issued by the mayor to the sheriff was not properly filled out.

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In re Osborne.

"Section 12165. If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order."

It has been decided in this state that where there is no question of jurisdiction concerned, or any other question except some formality in reference to the writ, that is held by the officer, that habeas corpus will not lie. In the 78th Ohio State, page 24, there is a case which is considerably like this:

"1. S was tried and convicted by the mayor of an incorporated village, who had jurisdiction over the offense, for violating Section 7033-1, Revised Statutes, which prohibits the business of barbering on Sunday. He was sentenced to pay a fine of fifteen dollars and the costs of prosecution, and upon his refusal to pay the same, the mayor issued to the marshal of said village a mittimus, therein commanding that the prisoner be committed to the county jail until said fine and costs be paid, without including the words, 'or secured to be paid,' as provided in Section 1536-793, Revised Statutes. Thereupon S applied to a judge of the court of common pleas of the proper county for a writ of habeas corpus, and one was issued. As the authority for holding S the said mittimus was submitted to the judge, who, being of opinion that the mittimus was defective because of the absence of said words, on application for that purpose, gave leave to the mayor to amend the writ so as to include said omitted words. The amendment was made accordingly, whereupon the petition for the writ of habeas corpus was dismissed. *Held*: It was not error to permit the amendment."

Now in commenting upon the case the Supreme Court uses this language:

"In this case, after the writ had been allowed, as we assume from the record, either by amendment of the first mittimus or by a new mittimus, it appeared that the mayor's order was within the law pertaining to his jurisdiction. The prisoner could secure the payment of the fine and costs if not able or willing to pay.

In such case we think the prisoner should not be discharged, for it is not the policy of our law to sanction the discharge of prisoners on defects in the proceeding which occur after sentence, and in an effort to carry it into execution. The amendment, or the new mittimus, as the case may have been, violated no fundamental right of the prisoner, but tended to afford a legitimate means of vindicating the law, which he was found to have violated. The punishment of the guilty rather than their escape, seems to be the purpose of all penal statutes. See *In re Bonner*, 151 U. S., 242; *Ex parte Van Hagan*, 25 Ohio St., 426.

"In several cases this court has set aside an excessive sentence and remanded the case to the trial court for re-sentence, and a judge in habeas corpus proceedings, where a valid judgment exists, may allow correction of the process issued thereon. We find no error on this branch of the case."

There is another case in the 91st Ohio St., page 315. I will read the syllabi:

"1. Where there is re-enacted in an amendatory act provisions of the original statute in the same or substantially the same language and the original statute is repealed in compliance with Section 16, Article II of the Constitution, such provisions will not be considered as repealed and again re-enacted, but will be regarded as having been continuous and undisturbed by the amendatory act.

"2. The provision of Section 12672, General Code, as amended April 21, 1910, that where a person has been convicted of a second offense he shall be imprisoned in the penitentiary is not *ex post facto* or retroactive when applied to a case where the second offense was committed after the enactment of the provision for the punishment of the second offense although the first offense was committed prior to the enactment of such provision.

"3. Where a person who is convicted of a crime under a statute prescribing punishment by imprisonment in the penitentiary for a definite number of years is given an indeterminate sentence the question of the validity of the statute authorizing such indeterminate sentence can not be raised in a proceeding in habeas corpus."

The writ will be denied, and the mayor of Hebron will be given an opportunity to amend his mittimus.

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State ex rel v. Fosdick et al.

**REMEDY OF A DISCHARGED EMPLOYEE UNDER THE
CIVIL SERVICE ACT.**

Superior Court of Cincinnati.

STATE OF OHIO, ON THE RELATION OF JOHN DUNN, v. PHILIP
FOSDICK, DIRECTOR OF PUBLIC SERVICE OF THE
CITY OF CINCINNATI, ET AL.

Decided, March 11, 1916.

*Civil Service—Classification and Protection of Employees a Legislative
Function—Perfection of an Appeal—Necessity of Complying with
Prescribed Steps—Constitutionality of the Act—Courts Without
Jurisdiction, Unless.*

1. The placing of certain positions in the classified service or in the unclassified service, or employees being protected by the civil service law, or not being protected by the civil service law, is a legislative function and not the exercise of executive duties, and Section 486-31 of the General Code of Ohio, known as the Moore-Barnes Act, is constitutional and not violative of Section 1 of Article II of the Constitution of Ohio.
2. Under the civil service law, Section 486-17a of the General Code of Ohio, the employee removed is required within ten days from the date of such removal to perfect his appeal from said order of dismissal to the civil service commission. This section is mandatory in effect, and if not complied with, such employee is without remedy in a court of law.

Moulinier, Bettman & Hunt, for plaintiff.

Charles A. Groom and Saul Zielonka, contra.

GUSWEILER, J.

The question before the court arises on a demurrer filed by the defendants to the reply of the relator.

The relator prays for a writ of mandamus directed to the director of public service of the city of Cincinnati, ordering him to recognize the relator as the lawful incumbent of the position of stableman.

In January, 1912, the relator was appointed to the position of laborer in the city water works. This position originally in the

unclassified service was later given the name of stableman and came into the classified service. The relator never took a non-competitive examination because no opportunity was afforded, but when a competitive examination for the position was held, he took that examination and passed it, though with an average not among the three highest. In September, 1915, the relator was notified by the director of public service that his services were discontinued by virtue of the new civil service law (106 O. L., 419). Thereafter the relator was excluded from his work and his name stricken from the pay-roll.

There are two questions at issue in this case:

1. Is the relator compelled to take the steps prescribed by Section 486-17a prior to filing a proceeding in court?

Section 496-17a provides that in cases of removal the appointing authority shall furnish the employee or subordinate with a copy of order of removal and his reasons for the same, and give such officer, employee or subordinate a reasonable time in which to make and file an explanation. Such order with the explanation, if any, of the employee or subordinate shall be filed with the commission. Any such employee or subordinate so removed may appeal from the decision or order of such appointing authority to the state or municipal commission, as the case may be, within ten days from and after the date of such removal, in which event the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm or modify the judgment of the appointing authority, and the commission's decision shall be final.

Section 31 of the civil service law divides the employees into three classes:

A. Those who were in positions by virtue of appointment from eligible lists as the result of competitive examinations.

B. Those who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915.

C. Those who were not in the service continuously for a period of seven years and who had not taken a competitive examination.

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The civil service law does not in and of itself vacate an office or discharge an employee. Section 486-31 provides that the appointing authority shall within ten days after this act becomes effective report to the commission the name of each officer, employee and subordinate holding a position in the classified service of the city at the time this act becomes effective who has not passed a regular competitive examination and who has not been in the service seven years as herein provided. This law does not vacate an office or discharge an employee. The law provides that within ten days the appointing officer shall report the names of those not holding their positions in Classes A and B. The effect of the law is to take away the protection of the civil service law from those in Class C. That in itself does not discharge the employee, but places him in the position where he may be discharged by the appointing officer. The employee's name in Class C is certified by the commission to the appointing officer with three names from the eligible list and the appointing officer has the power to retain his employee, and when he signifies his intention of retaining the employee, he immediately becomes a civil service employee and is protected by the provisions of said act.

The employee of Class C, not being protected by the civil service act, the director of public service has the legal right to discharge him for any reason that appeals to him, or indeed without any reason at all. (So held in the case of *State, ex rel Connolly, v. Fosdick et al*, 17 N.P.(N.S.), 486, in an able opinion by Pugh, J.) The director of public service in this cause assigned as his reason for the discharge the enactment of the new civil service law, and thereby it became the duty of the relator to proceed under Section 486-17a in order to be reinstated.

The Dayton Conservancy Act.—In the case of *County of Miami et al v. City of Dayton et al*, 92 O. S., the court says on page 219:

"A statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute. It should not be narrowly and technically construed, but upon the contrary should receive

a broad and liberal construction to effect the purpose of its enactment."

Section 486-17a was enacted for the purpose of providing a quasi-judicial tribunal to determine the correctness of a discharge, and until the relator has exhausted his remedies under this statute, this court has no jurisdiction.

The court of appeals in the case of *State, ex rel Fischer, v. Fosdick*, 25 C.C.(N.S.), 241, say:

"The petition does not show the relator, after the notice of discharge was served upon him, filed any explanation or asked the commission to reinstate him, and as long as he has a remedy under the civil service law, he must pursue that remedy and can not appeal to the courts until he has exhausted his remedy under that law."

The pleadings in this case do not show that the relator has exhausted his remedy under the civil service law, and therefore the demurrer to the relator's reply is sustained.

2. The constitutionality of the law.

The Moore-Barnes civil service law was enacted in order to carry out the will of the people as expressed by Article XV, Section 10, adopted September 3, 1912, which reads as follows:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

This section confers plenary powers on the Legislature to pass a civil service law. The kind and character of the civil service law is peculiarly for the Legislature to determine, and courts have not the power to declare a law unconstitutional merely because it does not agree with the policy determined upon by the Legislature.

The latest expression of the Supreme Court of Ohio relative to the court's power to declare a law unconstitutional is found in the decision of the Supreme Court in the conservancy act, *County of Miami et al v. City of Dayton*, *supra*:

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“7. Before a court is warranted in declaring a legislative act unconstitutional, it must clearly appear that the statute is obviously repugnant and irreconcilable with some specific provision or provisions of the Constitution. If there be a reasonable doubt as to such conflict the statute must be upheld.” (Syl.)

“8. The doctrine of home rule does not now, and never did, have any application to the governmental affairs of a state or the governmental affairs of a district within the state created by the state for the exercise of certain state sovereign powers.” (Syl.)

The relator refers to Section 1 of Article II of the Constitution as the specific provision of the Constitution violated by the enactment of Section 486-31 of the Moore-Barnes act.

The relator's contention is that Section 486-31 is the exercise of executive duties, and not legislative. The placing of certain positions in the classified service or in the unclassified service, or employees being protected by the civil service law, or not being protected by the civil service law, is a legislative function, and the Legislature in this case exercised that legislative function by prescribing under what conditions an employee shall be considered as being protected by the civil service law, or shall not be considered as being protected by the civil service law. The language of the Legislature lays down the qualifications essential for the holding of a position in the classified service, and this certainly the Legislature may do.

In the case of *State, ex rel Carnes et al, v. Fosdick*, No. 55859, Superior Court, the opinion of Pugh, J., the court holds that the incumbency clause of Section 10 of the civil service act of 103 Ohio Laws, p. 698, at p. 703, is constitutional, and the reasons assigned by this court in said case are applicable to the question at issue in this case.

The Constitution of Ohio divides the power of the government into three classes—executive, legislative and judicial. It is impossible to give an accurate definition of each of these powers that would embrace all cases that may arise in the future. Our courts recognize *quasi-judicial*, *quasi-legislative*, and *quasi-executive* powers, and the Supreme Court in the Dayton conservancy act, syllabus 9, says:

"Where a power is *quasi*-legislative, *quasi*-administrative or *quasi*-judicial, or so mixed in its nature that it may be regarded as a combination of all of them, the Legislature may in the first instance characterize such power and confer it either upon an existing agency of the government or an agency especially created for that purpose. There is no delegation of legislative power in the conservancy act violative of any constitutional provision."

The enactment of Section 486-31 is, in the opinion of this court, an exercise of legislative power, and the utmost that can be said against it is that it is a *quasi*-legislative power. In either case, the law is constitutional.

The Legislature, by express constitutional provision, has the power to enact a civil service law; the kind or character of law to be enacted is for the Legislature to determine, and having passed the Moore-Barnes act, this court will not consider and hold said act unconstitutional, unless the opposition between the Constitution and the law should be such that the court feels a clear and strong conviction of their incompatibility with each other. (*State, ex rel, v. Miller*, 87 Ohio St., 12.)

It is the finding and opinion of this court, first, that the relator did not pursue his remedy under the civil service law and therefore this court has no jurisdiction, and second, that the law is constitutional.

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Brewing Co. v. Reverman et al.

**LIABILITY OF TRUSTEES OF CORPORATIONS NOT
FOR PROFIT.**

Common Pleas Court of Hamilton County.

**THE GEORGE WIEDEMANN BREWING COMPANY v.
THEODORE REVERMAN ET AL.***

Decided, February 17, 1917.

Corporations—Action for Indebtedness Against an Association Not for Profit—Does Not Bar Proceedings Against the Trustees Individually.

1. The personal liability which attaches to trustees of corporations not for profit applies to debts incurred during their incumbency.
2. The procuring of judgment and issuing of execution against a corporation not for profit can not be pleaded as a bar to an action against the trustees on their individual liability arising under Section 8666, General Code.

Dolle, Taylor, O'Donnell & Geisler, for plaintiff.*Hackett, Yeatman & Harris*, contra.

GEOGHEGAN, J.

This is an action brought against Theodore Reverman and four other defendants as trustees of the Spotless Town Club, a corporation not for profit, under the laws of Ohio, to recover from them the sum of \$144.85 on account of merchandise sold and delivered.

It appears that the said Spotless Town Club was indebted to the plaintiff, and that the plaintiff recovered a judgment against said club, that a receiver was appointed for the club, and from the assets in the hands of the receiver, the plaintiff received a dividend of 8 per cent. on its claim, and that the defendants are entitled to a credit of \$13.66 on the amount of the claim herein.

*Affirmed by the Court of Appeals, on this opinion, October 1, 1918.

It is conceded that during the time the defendants herein were trustees, the amount of the indebtedness sued on herein was contracted by them on behalf of the said Spotless Town Club, and the only question raised in this case is that raised by the first defense in the first amended answer of the defendant, Theodore Reverman, which in substance sets forth that the judgment obtained by the plaintiff against the Spotless Town Club for the whole amount of its claim against the club is a complete bar to the action sought to be maintained here. As the facts were admitted at the trial, the matter was argued as if upon demurrer to the said first defense, it being conceded that if it were not a good defense then a judgment as sought for herein would lie.

This action is brought by virtue of Section 8666, General Code, which provides as follows:

“The trustees of a corporation created for a purpose other than profit shall be personally liable for all debts of the corporation by them contracted.”

It would seem by a mere examination of this statute that one must necessarily reach the conclusion that this action herein is properly brought, and still, counsel for the defendant insists that the action can not be brought against these trustees alone, but must be brought against all the trustees who served at various periods during which the entire indebtedness was contracted; in other words, that all the trustees should be made parties to this action, whether they are liable for the portion of the debt that is sought to be collected by this action or not. I can not agree with this contention. The defendants herein are not liable except for that portion of the indebtedness contracted by them during the time they were trustees. It is no concern of theirs who is liable for the balance of the indebtedness. The statute makes them absolutely liable for the indebtedness created by them, and therefore, they can not complain as to what course is taken by the plaintiff with reference to the liability of trustees

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who were such at other times and who may have contracted other portions of the obligation.

Nor, can it be said that the matter is *res adjudicata*. I am inclined to think that it might be a proper objection by trustees who are sued under the provisions of Section 8666, General Code, that the corporate assets, if any, had not been exhausted before the liability under that section was sought to be enforced by them, and this position seems to be sustained by the district court of this county in the case of *Walbrecht v. Pucketat*, 9 W. L. B., 335, wherein Judge Avery, in discussing the liability of trustees under the provisions of Section 3261, R. S., now 8666, G. C., and distinguishing between the liability of stockholders and the liability of trustees, says:

“The reason upon which the liability of stockholders is held to be only secondary, is because of the language, as well of the Constitution itself, as of the statute carrying the constitutional provision into effect, that the liability shall be ‘for the purpose of securing the creditors.’ The difference, in imposing liability upon the trustees, is because of the difference between the two classes of corporations, those of this class having no capital stock; but the liability is, in our opinion, of the same nature, to be resorted to by creditors, only when the debt can not be made against the corporation itself. It may not be necessary that a judgment should be obtained and execution issued. That the debt can not be made out of the corporation may be shown in any way. But it is not sufficient to show merely an act of insolvency, or failure; because, notwithstanding a failure to meet obligations, property may remain.”

While it can be seen from this decision that the court does not expressly pass upon the point that a judgment must first be obtained and execution issued, the court does, however, leave the matter in some doubt, and I am inclined to think that in cases of this kind as a matter of precaution a judgment should be obtained and execution issued. Whatever may be the correct rule as to this, it certainly can not be said that the securing of a judgment and the issuing of an execution thereon can in any way be said to completely adjudicate and bar the

claim against the trustees of the corporation, which exists under the provisions of Section 8666, General Code. Here, all the trustees who were liable for the debt sued on herein are made parties defendant. The former proceedings against the corporation are recited and the inability to satisfy the judgment out of the goods of the corporation, is set forth and the liability of these defendants, who alone are admittedly responsible for the contraction of the portion of the debt sued upon herein is set out. This is in conformity with the principle laid down in *Horstman v. Rix*, 3 Ohio Decisions Reprint, 172.

Judgment should therefore be entered for the plaintiff for the amount of the claim in the petition less the credit allowed in the reply.

MANDAMUS TO COMPEL TRIMMING OF A HEDGE.

Common Pleas Court of Licking County.

STATE OF OHIO, ON RELATION OF THEODORE F. HAINES, v.
WARREN F. WAGNER ET AL.

Decided, January Term, 1918.

*Hedge Fences—Enforcement of the Statute Restricting the Size of—
Pleadings—Discretion of Public Officials—Jurisdiction of Justice
of the Peace.*

1. An action to require the trimming of a hedge along a public highway, in accordance with the provisions of Section 5935, is not open to demurrer on the ground that an order directing the township trustees and highway superintendent to proceed with the trimming of the said hedge would amount to control of their discretion as public officials.
2. The fact that the damages accruing under the said statute might exceed the jurisdiction of a justice of the peace is not a bar to such an action, but judgment could not be asked in a sum in excess of \$300.

Kibler & Kibler, for plaintiff.

Chas. L. Flory, Prosecuting Attorney, contra.

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State ex rel v. Wagner.

FULTON, J. (orally).

This case is submitted to the court upon a demurrer to the petition. It is a suit brought by the state, on the relation of Haines, against the trustees of Burlington township, and one William Dunlap, highway superintendent of Burlington township.

The petition recites that these men are the duly elected and qualified trustees of Burlington township, and that Dunlap is the duly appointed and qualified township highway superintendent of Burlington township, and is still acting as such. Relator, who is the owner in fee simple of real estate, alleges that on the east side of a road, which passes in front of his premises, there is a hedge fence, which for a longer period than six months has been permitted to remain of a greater height and width than six feet; that the same is, and for years last past has been allowed to grow to the height of about twenty-five feet, and the branches thereof extend over and across the east half of said highway so as to obstruct the ordinary public use thereof.

The petition then recites the duties of these officers in reference to a hedge of that kind, that they have certain duties to perform in reference to it, and makes allegations which cover statutory matters which are required to be put in a petition in a case of this kind, and then comes the prayer of the petition:

“Wherefore, your relator prays that an alternative writ of mandamus issue out of this court requiring the said defendant, Dunlap, as such township highway superintendent, to give said notice to the owner of said hedge fence, and make complaint against such owner that said hedge fence is unlawful and unless it is cut to the legal height and width of six feet within 20 days from the service of said notice, a suit will be commenced for the violation of the statute which forbids the owner of said hedge fence to permit the same to remain of a greater height and width than six feet, and compelling the said defendants, Wagner, Edmund and Patton as such trustees, in case of the failure of said owner of said hedge fence to comply with said notice within said time, to commence an action against such owner before a justice of the peace of said township to recover a sum of money not exceeding fifteen cents per rod of such fence,

and requiring the said defendant, Dunlap, as such township highway superintendent, before said judgment is rendered to cause it to be made to appear by affidavit that the owner of said hedge fence has had at least 20 days' notice before the beginning of said suit, that such hedge fence is unlawful and that unless the same be cut to the legal height and width within 20 days from the service of said notice that such suit would be commenced, and to show cause why they should not perform the duties and obligations aforesaid, and that on final hearing of this cause that said writ be made peremptory, and that said defendants respectively be commanded and compelled by order of this court to perform said duties in respect to said hedge fence and the owner thereof as are provided by law, and your relator prays for all other proper relief to which he may be entitled in equity."

To that petition there is a general demurrer filed, claiming that the petition does not state facts sufficient to constitute a cause of action. That matter was argued and submitted to the court.

In the brief which has been filed in this case, the demurrant states four reasons why he claims that the court should sustain this demurrer: 1st. The cause of action made by the petition seeks to control the discretion of the defendants as public officers. 2d. The petition does not allege that the amount of damage the relator would have the defendants sue for is within the jurisdiction of a justice of the peace. 3d. The relator is himself furnished an adequate remedy at law. 4th. There is no law authorizing the trustees to remove the hedge fence.

Section 5935 reads as follows:

"The owner of a hedge fence on a partition line, or along a public highway, shall not permit it to remain of a greater height or width than six feet, for a longer period than six months, or leave the cuttings from it on the public highway for a longer period than ten days."

"Section 5936. A person violating the next preceding section shall be liable to the person damaged in a sum not exceeding twenty cents per rod of such hedge fence. If the hedge is along a public highway, he shall be liable to the trustees of the township in which it is situate in a sum not exceeding fifteen cents per rod of such fence."

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“Section 5937. Before judgment is rendered under the next preceding section, it must appear, by affidavit, that the person complained against has had at least twenty days’ notice, before the beginning of the suit, from the person complaining, that such hedge was unlawful and that unless it was cut to the legal height within twenty days, suit would be commenced for such violation.”

“Section 5938. Actions under the next three preceding sections shall be brought upon the complaint of the person damaged, before a justice of the peace of the township in which the hedge is situated, or if it is along a public highway, the complaint shall be made by the road superintendent in whose district it is situated.”

It is claimed by the demurrant that this petition seeks to control the discretion of defendants as public officers. The court does not think that is so. It was argued that because it is said in the statute they could recover a sum not exceeding fifteen cents per rod, that they might find there was no damage at all by reason of this fence being left as it was, and for that reason they would not bring a suit under this section because they thought that there was no damage at all on account of the hedge, and that to seek to compel them to bring this suit would be to compel them to do differently than their judgment would tell them to do under the circumstances. But, the court does not think that the statute should be construed in that way. The court does not think that they have a right to say, where the fence is in that shape—that is, as described in this petition—that they could find there was no damage at all, and for that reason they would not be required to bring a suit. “If the hedge is along a public highway as this is he shall be liable to the trustees of the township in which it is situate in a sum not exceeding fifteen cents per rod of such fence.”

Now, the court thinks that section makes it peremptory upon the trustees, when this state of facts exists, to bring the action against the owner for such sum as they might determine, but some sum must be designated. And the court thinks that ground of the demurrer is not well taken.

Lucking et al v. Life Insurance Co. [Vol. 21 (N.S.)]

The second ground of the demurrer is that the petition does not allege that the damages which the relator would have the defendant sue for is within the jurisdiction of a justice of the peace. The court thinks that is not well taken. The statute is peremptory, and says that the action must be brought before a justice of the peace. It could not be brought for a larger amount, of course, than the jurisdiction of a justice of the peace, could not be brought for a larger sum than \$300, but the statute says that the action must be brought before a justice of the peace. So, the court does not think that ground of the demurrer is well taken.

The next ground of the demurrer is that the relator is furnished an adequate remedy at law. I do not know what the adequate remedy at law would be. The court does not think that that ground is well taken. The demurrer is overruled and exceptions.

CONSTRUCTION OF A CONTRACT OF LIFE INSURANCE.

Court of Common Pleas of Hamilton County.

WILLIAM LUCKING, AN INFANT, BY EMMA LUCKING, HIS GUARDIAN AND NEXT FRIEND, ET AL V. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.*

Decided, May, 1917.

Life Insurance—Words Found in the Contract Constituting the Policy Must be Given Their Ordinary Meaning—"Children" Can Not be Construed to Mean "Grandchildren."

Where a policy of life insurance gives the proceeds to the wife of the insured and after her death to their children, the word "children" can not be construed to include "grandchildren" where the death of the beneficiary precedes that of the insured.

*Affirmed, *Lucking et al v. Life Insurance Co.*, 29 O.C.A., 161.

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Lucking et al v. Life Insurance Co.

Matthews & Klein, John A. Scanlon, Chas. M. Leslie and Clarence M. Smith, for plaintiffs.

Vorys, Sater, Seymour & Pease, Wilbur E. Benoy, A. C. Gallagher, John K. Kennedy and Clarence M. Smith, contra.

CALDWELL, J.

On the demurrer to the petition.

I am of the opinion that the demurrer to the petition should be sustained both on principle and authority.

On principle, because to sustain the contentions of the claimants would be doing violence to the express language of the contract itself.

This contract is to be construed as should any other contract, in accordance with the well settled rules of construction, that words are to be given that meaning and sense which ordinarily attaches to them, and should not be given any amplified or enlarged construction in order to produce a desired result, which without amplification could not be accomplished.

This contract gives the proceeds of the insurance to the wife, and after her death to their children. What principle or rule of construction, therefore, would justify the court in saying the word "children" meant "grandchildren"? It is not a will, or the occasion for the construction of some such word as "issue" or "heirs," wherein it is a matter of uncertainty as to how comprehensively the user of the term intended it should be applied.

The contract uses the word "children," and I know of no rule of construction of an ordinary written contract, in which is used a word whose meaning is as clear and common as is the word "children," which should require the court to now say it means "grandchildren."

The demurrer should also be sustained on authority. I can see no element in the principle governing the case at bar differentiating it from the principle laid down in *Ryan v. Rothweiler*, 50 O. S., 595. Much as may be the weight of authority against this principle by reason of the adjudications outside of this

state, and as lead by the Connecticut case of *Insurance Company v. Palmer*, 42 Ct., 60, our Supreme Court had this situation before it when announcing its opinion in the Ryan case. It seems to have been unable to have been induced to follow it, and lays down the principle that as between the insured and the descendants or heirs of the named beneficiaries, the proceeds of the policy belong to the estate of the insured.

In the case at bar, under the ruling of the Supreme Court, the surviving child Leo, in the event of the death of the insured, after the death of the mother, was clearly entitled to the proceeds of the policy. His claim having been satisfied by the company, the heirs of his brothers and sisters, or their personal representatives, have no standing in court.

The unreported cases of *Frank v. Bauman*, 42 O. S., 621, and *Dogle v. Dogle*, 69 O. S., 576, in so far as can be ascertained from the records and briefs, as shown by counsel for defendant here in his brief, seems also to indicate a desire on the part of our Supreme Court to adhere to the principle in the Ryan case, and an unwillingness to depart from the same.

I am not unmindful of the ruling of our court of appeals in the Twachtman case, but as the principle involved here was not there before the court for determination, I can see no demand for following its *obiter* or overruling the Supreme Court, which would be the effect, as far as I see it, if this demurrer were now overruled. I am of the opinion, therefore, it should be sustained.

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Brewing Co. v. Payne et al.

**LIABILITY FOR RENTS ACCRUING UNDER A
RECEIVERSHIP.**

Common Pleas Court of Hamilton County.

**THE HERMAN LACKMAN BREWING COMPANY V. JOHN A. PAYNE
AND REUBEN S. PAYNE.**

Decided, 1916.

Landlord and Tenant—Recovery of Judgment for Rents Due—Not a Bar to Subsequent Action for Later Installments—Individual Liability of Lessee Not Affected by Occupants Being Placed in Hands of a Receiver.

1. The recovery of judgment for rent due up to the time of the filing of the suit is not a bar to a subsequent action for installments thereafter accruing for the remainder of the term of the lease.
2. Neither does the fact that a receiver was appointed in said first action, and remained in control of the property until the expiration of the lease, affect the liability of lessees for rents accruing during the receivership; nor is the plaintiff by reason of such appointment limited in his recovery to the fund in the hands of the receiver.

*Bettinger, Schmitt & Kreis, for plaintiff.**J. C. Hermann, contra.*

MAY, J.

The plaintiff sues the defendants for balance due on three months' rent on a ten-year lease executed December 24, 1904. The defendant, John A. Payne, filed his answer setting up four defenses. The plaintiff demurs to the first, third and fourth defenses set up in the answer.

To dispose of the demurrer it will be necessary to examine somewhat in detail each of these defenses. The first defense is a plea in bar to the action setting forth that in a previous suit in this court, to-wit, No. 157504, wherein the present plaintiff was the plaintiff and the present defendants, as well as one

William Bodemer, to whom the plaintiffs had assigned the lease sued upon, were defendants, the subject-matter being the same and judgment having been recovered in that action. An examination, however, of the allegations set out in the answer of Payne filed in the present case, as well as an examination of the judgment entry in No. 157504, discloses the fact that the plaintiff in the former action merely recovered for the installments of rent due at the time the action was filed, and that it did not recover, nor is it alleged in the present answer that it did recover any judgment for the installments of rent now sued upon.

Therefore, upon the authority of *Strangward v. American Brass Bedstead Company*, 82 Ohio State, 121, the demurrer should be sustained.

The fourth defense sets forth that in the previous case, No. 157504, the present plaintiff caused a receiver to be appointed to take charge of the leasehold, and that because the receiver remained in control of the premises until the expiration of the lease, the original lessees can not be held liable upon the lease.

I am of the opinion that the demurrer to these defenses should be sustained. In Ohio it is well settled that a receiver appointed by a court is purely a ministerial officer and the servant of those from whom he receives his appointment; that under no circumstances can it be said that a receiver by virtue of his office in any case becomes vested with the title to the property or the assets which he administers, and his relations to the property, like that of a constable, sheriff or master in chancery, are merely that of a ministerial officer. He is not an assignee of the property for which he is appointed receiver. *Lafayette Bank v. Buckingham*, 12 Ohio St., 419, at 425; *Marshall v. Caverly Co.*, 5 N.P.(N.S.), 185, at 186. This is the law generally in this country. *Jones on Landlord and Tenant*, Section 443; *1 Tiffany on Landlord and Tenant*, pages 184, 185; *Bell v. American Protective League*, 163 Mass., 558; *N. Y. P. & O. R. Co. v. N. Y., L. E. & W. R. Co.*, 58 Fed., 268, at 278.

It is contended, however, by the defendant that inasmuch as the present plaintiff invoked the appointment of a receiver in the previous action, that he can only look to the fund in the

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hands of the receiver for payment of the rent, and if there is any deficiency he must be the loser because he invoked the jurisdiction of the court for the appointment of a receiver.

The previous case as set out in the allegations of the answer in the present case conclusively show that the receiver in the former case was appointed to take charge of the property during the pendency of the suit, and that he applied all funds in his hands toward the payment of rent, and that the plaintiff gave the defendants credit for funds so applied. The plaintiff had the right in the previous suit to ask for the appointment of a receiver for the protection of its lien upon the property leased and the chattels therein contained. The mere application for the appointment of a receiver was not an eviction of the tenant named in the lease, it was merely an ancillary proceeding as was held in the case of *Wolf v. Ranck*, 141 N. W. R., 442 (Supreme Court of Iowa).

Counsel for defendants cite as supporting their contention the case of *Dorr Run Coal Co. v. Nelsonville Coal Co.*, 11 N.P. (N.S.), 459. This case is easily distinguishable from the case at bar. Plaintiff there sought to recover for a period during which the property was in the hands of a receiver, and therefore in the custody of the law, and the appointment of which receiver prevented the operation of the property as contemplated by the contract. In the case at bar the receiver operated the property as contemplated by the lease.

**IMPLIED AUTHORITY OF A SURGEON TO MAKE WHATEVER
OPERATION HE FINDS NECESSARY.**

Superior Court of Cincinnati.

SOPHIA HARRISON v. CHARLES A. L. REED.

Decided, April 27, 1916.

Physician and Surgeon—Operation Consented to Involving Abdominal Incision—Second Incision Found Necessary During the Operation—Authority so to do Implied.

1. When a patient, after describing her symptoms to a surgeon, voluntarily submits to the performance of an operation which is expected to require but a single incision, she is presumed to authorize the surgeon to perform such operation as may be required by her condition; and where in the performance of the operation the surgeon finds that it is necessary to make an additional incision for the purpose of reaching the cause of the symptoms described by her, authority to make such additional incision will be implied in law.
2. When a patient describes to a surgeon the symptoms of an ailment from which she is suffering, and consents to an operation for the relief of her condition, she will be presumed to have authorized the surgeon to perform such operation as may be required by the conditions which he finds. And when, in the course of the performance of such operation, it appears to the surgeon to be necessary to extend its scope beyond what was originally contemplated, consent to such extension will be presumed, even though it requires the making of a second and separate incision.

Carl Werner and E. S. Hertwig, for plaintiff.

Robertson, Buchwalter & Oppenheimer, contra.

GUSWEILER, J.

This cause is now submitted after both plaintiff and defendant have introduced all their evidence, on a motion for an instructed verdict and to withdraw said cause from the jury's consideration and for a verdict in favor of the defendant. The court doth find that the sole and only issue in this case is whether or not the defendant, Dr. Charles A. L. Reed, performed the upper opera-

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tion and made the upper incision upon plaintiff in, this case, without her consent. If he did, he would in law be liable for all consequences. To perform this upper operation it was necessary for the defendant in this case to have had plaintiff's consent, either expressly or impliedly. Plaintiff denies that she or anyone else gave defendant this permission, but that he did have permission to perform the lower operation on her abdomen and to make the lower incision only to relieve her of certain ailments in the colon as indicated by various disorders and symptoms.

The law implies her consent to all things necessary to be done under all the circumstances and conditions of plaintiff when the first incision was made, having in mind the symptoms of plaintiff, and to the performance of such operation as was reasonably necessary to save and protect plaintiff from continued serious illness. If having her consent to make the lower incision, and to perform the lower operation with the understanding that this was all that was to be done, and that no other incision or operation was required, nevertheless, if the defendant found on opening plaintiff's abdomen by the lower incision that another incision was necessary to reach and alleviate the ailments and disorders of the colon elsewhere, as evidenced by the symptoms and conditions of her abdomen as shown at that time and the defendant, having therefore made this upper incision and located the seat of and remedied the ailment and disorders as indicated by these other symptoms, the consent of this plaintiff to the making of such other upper incision and to the performance of such other upper operation will be implied in law.

The only evidence indicating that the defendant had no consent and was not authorized nor justified in making this upper incision and performing this upper operation, is plaintiff's testimony setting forth the defendant's admission to her that he did so only to explore conditions of a former operation. Against this, the defendant admits that he told plaintiff so, but qualifies said statement in that he says that it was necessary and prudent so to explore, to locate the seat of the trouble (stomach disorder) which he could not do through or by the

lower incision. This situation and condition was discovered by the defendant after making the lower incision and performing the lower operation. All of the evidence of justification on the part of the defendant performing this upper operation stands uncontradicted except by plaintiff's testimony as to the defendant's admission.

In the face of this situation the court finds that plaintiff's testimony as to want of authority on the part of the defendant, even if all of it were admitted to be true, considered with defendant's evidence and proof, as a matter of law, does not present a scintilla of evidence of disputed fact justifying submitting this case to the jury. The law will imply that in this case, under these circumstances, plaintiff gave consent to the performance of this upper operation.

On the evidence presented at this time by both plaintiff and defendant, even admitting all that plaintiff has testified to to be true, the court finds that as a matter of law there is no legal liability owing by defendant to plaintiff in this action.

The motion will be granted and the case will be withdrawn from the jury, and the jury will be directed to bring in a verdict for the defendant.

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**VALIDITY OF STREET IMPROVEMENT CONTRACT IN EXCESS
OF ESTIMATE.**

Superior Court of Cincinnati.

JAMES A. McDONALD, A TAX-PAYER, ON BEHALF OF THE CITY OF
CINCINNATI, v. CHARLES F. HORNBERGER, DIRECTOR OF PUB-
LIC SERVICE OF THE CITY OF CINCINNATI, ET AL.

Decided, December 26, 1918.

*Street Improvements—Contract for, Not Rendered Invalid—By Reason
of Being in Excess of the Engineer's Estimate—Where No Statute
Limits the Actual Cost to the Estimated Cost.*

1. A contract made by a municipality with the lowest and best bidder for a street improvement in full compliance with law as to all conditions precedent, with no averment of fraud, bad faith, irregularity, unreasonableness or excessiveness, is valid, notwithstanding the amount of said contract exceeds the city engineer's estimate.
2. Where the statute law does not limit or restrict the actual cost of a municipal street improvement to the estimate thereof by the engineer, the fact that the actual cost exceeds the estimated cost will not invalidate the contract.

Saul Zielonka, City Solicitor, for City of Cincinnati.

Walter C. Taylor, for Henkel & Sullivan.

James A. McDonald, contra.

GUSWEILER, J.

This cause is before the court on a demurrer to the amended petition of plaintiff filed as a tax-payer on behalf of the city of Cincinnati against the director of public service of said city and others, in which it is contended that the proper officers of said city in full compliance with law as to conditions precedent entered into a contract on the 11th day of December, 1918, with certain of the defendants, who tendered the lowest and best bid for a certain proposed improvement of Freeman avenue, Cin-

cincinnati, Ohio, for the sum of \$111,523.50; that the engineer of said city, some time during January, 1918, made an estimate of the cost of said improvement in the sum of \$103,634.50, being \$7,889 less than the lowest and best bid aforementioned; that therefore the contract is illegal and in violation of plaintiff's rights as such tax-payer.

It is agreed that the sole question of law, at issue in the case at bar, is as to the validity of a contract entered into between a municipality and the contractor tendering the lowest and best bid for a street improvement in excess of the city engineer's estimate. The plaintiff admits that the city has complied with the law in every respect touching the various statutory conditions precedent to the entering into said agreement.

There is no charge of fraud, bad faith, irregularity, excessive or unreasonable cost concerning said accepted bid. The only point raised by plaintiff is that because the amount of the bid and contract in question exceeds the city engineer's estimate, the contract is for that sole reason illegal. It is not disputed that between the date of the engineer's estimate rendered and the date of the bids received, our country was in the midst of a world war, during which time labor and materials were continually rising in cost, which extraordinary condition explains the real reason for the difference in the amount of the engineer's estimate and the lowest and best bid.

This point has never been raised in our assessment law, and as far as we are able to observe, there are no reported decisions exactly in point in any of our courts in Ohio.

In the consideration of this question it is necessary to construe the following sections of the General Code:

"Section 3814. When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by special resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication.

"Section 3815. Such resolution shall determine the general nature of the improvement, what shall be the grade of the

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street, alley or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to ten installments at such time as council prescribes.

“Section 3816. At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested.

“Section 3818. A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner can not be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be *prima facie* evidence of the service of the notice as herein required.

“Section 3825. If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution theretofore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement.

“Section 3901. If in any such action it appears that by reason of any technical irregularity or defect, whether in the proceedings of the council, or any other officer of the corporation, or in

the plans or estimates, the assessment has not been properly made against any defendant or upon any lot or parcel of land sought to be charged, the court may nevertheless on satisfactory proof that expense has been incurred which is a proper charge against such defendant, or lot or parcel of land in question, render judgment for the amount properly chargeable against such defendant or on such lot or land, but in such cases the court shall make such order for the payment of the costs as may be deemed equitable and proper.

"Section 3909. If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitation prescribed for such assessment, make an additional pro rata assessment to supply the deficiency. In case a larger amount is collected than is necessary, it shall be returned to the persons from whom it was collected, in proportion to the amounts collected from such persons respectively. This section shall be subject to the limitations contained in other sections of this chapter.

"Section 3911. Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained."

There is no statute in Ohio prohibiting a municipality from letting a contract for a street improvement at a price in excess of the preliminary estimate of the engineer. It would seem if the Legislature had intended that the preliminary estimate should be the maximum price at which the contract could be let, it would have expressly so declared, as it has done (in Section 6956 of General Code) with reference to the construction of state and county improvements. That section reads, in part, "No contract shall be let for more than the estimated cost of the improvement." A similar provision is found in Section 2323, General Code, which is that, "No contract shall be made for labor or materials at a price in excess of the entire estimate thereof." A like provision is found in Section 2358, General Code:

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“Section 2358. No contract shall be made for a public building, bridge or bridge structure, or for any addition to, change, improvement or repair thereof, or for the labor and materials herein provided for, at a price in excess of the estimates required to be made by the preceding sections.”

A careful comparison of the sections of the General Code referred to and those relating to municipalities leads to an obvious conclusion that it was not the intention of the Legislature to limit the engineer's estimate as being the maximum amount of the contract.

It would seem to follow that the sole purpose of requiring an estimate was to determine approximately the cost of the contemplated improvement.

Webster defines the noun “estimate” as follows:

“A valuing or rating especially from incomplete data; A rough or approximate calculation, as an estimate of the cost of a building.”

Apparently the estimate being an approximation merely, the real cost, when bids are opened, may be lower or higher depending upon the accuracy of the calculation and upon whether the price of labor and materials has fluctuated either up or down between the time of the making of the estimates and the time the bids were opened.

The fact that there is not statutory restriction against municipalities letting contracts in excess of the engineer's estimate would naturally indicate that the word “estimate,” as used in the sections relative to municipalities means that the sole purpose of the estimate was to advise both the city officials and the property owners of the approximate cost.

For the past year or more during these war times, by common knowledge, we know that the prices of labor and materials have been constantly increasing. It would doubtless be almost impossible for any engineer upon a given day to give an estimate that would accurately foretell what the exact cost of the construction would be at the time bids were opened. For the engineer to add to the amount of his present estimate an arbitrary

amount to cover probable fluctuations in the price of labor and materials until the time of the letting of the contract, would be to enter the realm of conjecture. Under the conditions of our country at present and for some time past, every reasonable person necessarily knows that when an estimate has been made, it has been subject to the increase by the daily changes in the market prices.

We are of the opinion that if notice of the resolution is served on the owner and the estimate of the engineer is on file together with the plans and specifications for the proposed improvement, he will have no valid legal complaint if such estimate is subsequently exceeded in the actual letting of the work, especially where the cost is reasonable and fair, and there is no fraud or bad faith charged.

After all, the estimate doubtless, is merely an approximate calculation to give the property owner an idea of what the improvement is going to cost. Without a statute expressly limiting the cost to the estimate, it can not fairly be said that the construction to be placed upon the estimate should serve the purpose guaranteeing to the property owner that the actual cost would not exceed the amount of such estimate.

While the law of Ohio is silent on the issue in the instant case, we are not without abundant authority throughout the United States holding as we do that, where the statute law does not prohibit the letting of contracts for street improvements at a cost in excess of the preliminary estimate, the fact that the actual cost exceeds such estimate does not invalidate the contract.

In the case of *Kelley v. Morton*, 179 Mo. App., 296, the court say:

“Where the city charter does not limit or restrict the actual cost of the street improvement to the estimate thereof by the engineer, nor provide that the bills shall be invalid if the estimate is not accurate, the fact that the actual exceeds the estimated cost will not invalidate the tax. Under such a charter or statutory provision, the estimate is advisory merely. It would be unjust in such case to deprive the contractor of the rewards of his work, after he had honestly and faithfully performed his

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contract, merely because the advice given by the city's engineer was not accurate."

The court say on page 298:

"There is nothing in the statute saying that the actual cost shall not exceed the estimate; nor does it say that the estimate, if not accurate, will invalidate the tax bills. The accuracy of the estimate is not a condition precedent to the letting of the contract. *Probert v. Garth*, 155 Mo. App., 1, c. 390. In that case Ellison, J., in speaking of the objection that although the area had been greatly reduced, still the actual exceeded the estimated cost, said: 'This goes to show that the estimate was a poor one, but we do not see how it can affect the validity of the tax bills. There are cases holding bills to be void if the work was let at a price in excess of the estimate, but those were where the work was done in cities whose charters forbid contracts in a sum beyond the estimate. No such restriction appears in the charter of cities of the second class, to which St. Joseph belongs.'"

Where the statute does not restrict the amount of the final estimate to the amount of the preliminary estimate, the latter is advisory merely. 2 Page & Jones on Taxation by Assessment, Section 819.

Being advisory only, it can not, by reason of its being a poor or inaccurate estimate, render invalid an assessment. Of course, where the statute in express terms prohibits the letting of a contract for public improvement in excess of this estimated cost, a different question is presented and decisions based on such statutes are not applicable. *State, ex rel, v. Bates*, 235 Mo., 1, c. 283.

In the case of *Vincent v. South Bend* (Supreme Court of Washington), 145 Pacific, 452, the statute provided that at the time of the initiation of the improvement, the city council shall cause an estimate to be made of the cost and expense incident to the improvement, which estimate shall be approved by the city council. The second paragraph of the syllabus is as follows:

"An assessment for a local improvement, although greatly in excess of the estimated cost, is not void where the assessment did not exceed the benefits and was no more than the *bona fide* cost

of the improvement; it appearing that the improvement was more expensive than expected, owing to the refusal of the federal government to assist, as had been expected."

The court say at page 453:

"The only purpose of this estimate is to influence the city council in determining whether it will initiate any improvement; the right of the property owner to be determined by the actual *bona fide* cost of the improvement which, when it exceeds the estimated cost, can only be assessed against the property benefited after due notice and hearing, at which time all the rights of the property owner may be protected. The amount of excess is large in this case, but there is no showing that the excess amount does not represent the actual *bona fide* cost of the improvement. In fact, there is no attempt to make such a showing; it being conceded so far as the record goes that the ultimate cost was the *bona fide* actual cost. The excess is actually accounted for when it is understood that, instead of being made at a nominal cost, as was first contemplated under the arrangement with the government engineers, it was necessary to make the arrangements with private contractors to build the work that should have been undertaken and completed under the contract with the government engineers, thus largely increasing the cost of the improvement, but not increasing the assessment beyond the actual *bona fide* cost of the improvement. Such an assessment is valid."

In the case of *Inner-Circle Property Co. v. Seattle*, 69 Wash., 508, the first paragraph of the syllabus is as follows:

"The fact that the actual cost of an improvement exceeds the original estimate does not affect the power of the city council to levy an assessment upon property to the extent of benefits received, within the limit allowed by law, where the estimate required by the charter was made by the Board of Public Works to enable the council to act advisedly in ordering an improvement within the fifty per cent. limit of the assessed valuation, and no notice to the property owners or hearing upon the amount of the estimate was required to be given."

In *Moran v. Jersey City*, 58 N. J. L., 148, the court say:

"The preliminary assessment was made before any of the work of the improvement was commenced, and was only an

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estimate made upon what was perceived on the surface of things to give the property owners a general knowledge of the approximate expense of the improvement, but the cost of the work was increased by unforeseen and unavoidable difficulties in its progress. The work proved to be of a somewhat different character from that anticipated. The preliminary estimate of the expense can not be allowed to control absolutely the commissioners in their final assessment.

“Neither the city charter of Jersey City, nor any other statute authorizing an assessment of this character provides that the preliminary estimate or assessment shall govern the commissioners in making their final assessment. This may be the case as to the final assessment of the cost of the formal opening of the street, but it is not applicable to an assessment for the improvement of the character now under review. Pamph. L., 1871, page 1094. This objection to this assessment can not prevail.”

In the case of *State v. Town*, 38 N. J. L., 419, the court say, at p. 420:

“The first reason assigned is based upon the fact that according to a calculation which the engineer made upon the basis of the contractor's prices, as applied to the estimated quantities of work before the improvement was begun, the cost was about \$28,038.45. But at the close of the work the cost was found to be \$35,854.13 which, with interest and the incidental expenses, raised the total amount assessed to \$44,002.41. This preliminary estimate of cost was made for no other purpose than to enable council to determine who was the lowest bidder, and the evidence indicates that its error arose chiefly from the fact that more rock was found at the grade than was anticipated, and therefore it became necessary to excavate over a large portion of the street, to a depth of eighteen inches lower than at first expected, in order to secure an earthy surface for the roadway. Under these circumstances, and the absence of any fraud, the municipality ought not to be estopped by such estimate and precluded from imposing on those whose property was benefited, the real cost of the work, to the extent of their constitutional liability.”

In the case of *Sheridan v. Fleming*, 93 Mo., 321, the court say, at p. 324:

"There is nothing in the act which limits the amount to the estimate first made by the commissioners. The law does not contemplate that they must, in the first instance report the *exact* amount of the work. It would be impossible for them to do this, for they must pay for the service, condemnation of property and the like, all of which expenses must be paid out of the fund. *Neither these expenses nor the cost of the work can be ascertained with accuracy in advance.*"

In the case of *Auditor General v. Chase*, 132 Mich., 630, the court say, at p. 632:

"In September, 1898, the annual appropriation bill did give notice of an intention to pave Saginaw street, between Jackson street and Oakland avenue at a cost estimated at \$40,000. Subsequently the expenses turned out to be some \$70,000, of which the city assumed to pay something over \$20,000, leaving merely \$50,000 to be raised by special assessment. It is contended that the council did not have jurisdiction to levy in excess of \$40,000 in a special assessment for the purpose mentioned. We contend that this statute is susceptible of this construction. The fact that council intended to enter upon the work is sufficiently set out in the annual appropriation bill, and the fact that it turned out later that the expense of the improvement was greater than anticipated does not make it necessary for the city to wait another year before entering upon the contemplated work."

Plaintiff's contention is that in letting this contract for a sum in excess of the engineer's estimate, his rights under the United States and the Ohio Constitution are invaded in that property is being taken without due process of law; that it is a jurisdictional prerequisite on the part of the city to let said contract within the sum set out in the estimate and that the purpose of the notice served upon the property owners is to advise them of the maximum cost, etc.

With these conclusions we do not agree. We think it is clear from what has been said that unless there is something in the nature of the estimate required to be made and approved by council as a part of the initial step looking toward the levying of special assessments which give rise to some rights on the

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part of the owners of the property to be assessed, there is nothing to prohibit the proper municipal authorities from letting a contract for street improvement at a price in excess of that fixed in the estimate. In other words, there is no public right which could be enforced by general tax-payers of the city which would be violated by such action on the part of the proper authorities.

Nor are we able to see that there is any private right arising in favor of the owner of property which is to be assessed that would be violated by so letting the contract. True, he has notice that the estimated cost of the construction work of the improvement is to be a certain figure. But in the absence of a statute limiting the actual construction cost to that estimated we do not see how it could be argued that he would have a right to expect that the actual cost of the construction would be so limited. Unless there is something in the very nature of the estimate which makes it without the express language contained in the sections to which we have referred, a limitation on the amount of the contract or on the amount thereof which is to enter into the assessment, the property owner's knowledge of the amount of the estimate would carry with it as a necessary implication the correlative knowledge that it is but an estimate—a guess—and that there is nothing in the law which would prevent its being exceeded by the actual cost of the construction work.

The statutes make it perfectly clear that at the very most the estimate is not a limit on the amount which can be assessed because:

First. Many other items of the cost of the improvement are included in the total cost which is to be assessed.

Second. The council need not assess the entire cost of the improvement nor even the maximum proportion thereof which by law it is permitted to assess, and there is nothing in the statutes requiring council to decide at the time it passes the resolution of necessity or even at the time it passes the ordinance determining to proceed with the improvement, that it will assess any definite proportion of the total cost.

Third. It is perfectly clear that so long as the essential character of the improvement is not changed, supplemental contracts may be entered into, the effect of which may conceivably be to change the total cost of construction. Indeed, this power to modify the original contract shows that not only may the estimate be exceeded by its exercise, but the plans and specifications themselves may be changed thereby so long as what is substantially a different improvement does not result therefrom.

All these things the owner of property to be assessed who has been served with notice of the passage of the resolution, of necessity must be deemed to know in a legal sense. He does, however, have a right to believe that the amount fixed in the estimate has been fixed in good faith and that it represents an honest effort on the part of the officers of the municipality to advise property owners to be assessed of the probable cost of the improvement, but in the state of the statute laws applicable to municipal assessments, it can not be regarded as an assurance to him that the work will not cost more than that amount.

From a consideration of the foregoing authorities, and in view of the fact that there is no statute in Ohio prohibiting municipalities from letting contracts for street improvements at a price in excess of the preliminary estimate referred to in Section 3815 of the General Code, we are of the opinion that if upon a letting of a contract for street improvements the bids exceed the amount of the preliminary estimate of the engineer, this of itself would not invalidate the assessment levied against the property owners.

It follows that the demurrer will be sustained and the petition dismissed at plaintiff's costs.

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Talge Mahogany Co. v. Quinn.

RESPONSIBILITY FOR FAILURE OF AN APPLIANCE SOLD.

Common Pleas Court of Hamilton County.

THE TALGE MAHOGANY CO. v. JOHN N. QUINN.*

Decided, July, 1917.

Sales—Seller Not Responsible for Inefficiency of Appliance Sold—Where it is Within the Power of the Buyer and not the Seller to Remedy the Defect—Charge of Court with Reference to Nature of Contract of Sale.

1. Where inefficiency of a mechanical appliance sold was due to causes beyond control of the seller and wholly under control of the buyer and not removable without his consent, although the changes could have readily been made by him, the responsibility of the failure of the appliance rests upon the buyer and not upon the seller.
2. A statement in the charge to the jury, which seemed to restrict them to an implied contract of sale, is not sufficiently prejudicial to warrant a reversal, where testimony had been introduced tending to show an express contract and the jury were left to determine whether the work the appliance was expected to do was covered by an express or an implied contract, and the charge as a whole was more favorable to the buyer than the seller.

Cogan, Williams & Ragland and H. A. Reeve, for plaintiff in error.

Burch, Peters & Connolly and W. D. Murphy, contra.

COSGRAVE, J.

This cause comes on to be heard upon a petition in error from the municipal court of the city of Cincinnati, seeking the reversal of a judgment of that court rendered in behalf of the plaintiff, who is now the defendant in error.

There are three principal errors complained of:

1. That the verdict is clearly against the evidence and contrary to law.

*Reversed in part, *Talge Mahogany Co. v. Quinn*, 29 O.C.A., —.

2. Exclusion of evidence concerning an express warranty and holding that an express warranty can not exist at the same time with an implied warranty.

3. That the court erred in its charge to the jury.

The action was brought in the court below by the John N. Quinn Co., who hereinafter will be called the seller, against the Talge Mahogany Co., hereinafter called the buyer. The action was for the recovery of the price of an appliance known as a "Dutch oven," installed by the seller in the plant of the buyer at Indianapolis. The seller recovered a judgment below in the sum of \$648.04.

The bill of exceptions in this case covers nearly three hundred pages, and the court will not attempt to review the bill in detail, but rather to give its own deductions from a careful reading of all the evidence.

Negotiations leading to the sale of this "Dutch oven" commenced on August 31, 1912, when the seller wrote to the buyer informing him that Mr. Seibert, of the Smith, Myers & Schnier Co., of Cincinnati, had informed them that the Talge Co. would probably be a buyer for a flat top furnace. The letter called the proposed buyer's attention to the appliance he was selling and gave by way of reference, C. A. Garnady, of Greencastle, Crane & Co., of Cincinnati, and I. J. Ruth, of Poplar Bluff, Missouri, suggesting that the buyer write to these parties as to the satisfaction the "Dutch oven" had given in their respective plants, and suggesting further that the seller would have their Mr. Quinn go to Indianapolis and talk the matter over with the proposed buyer, if the proposed buyer so desired.

It appears that the seller and the buyer had several interviews at Indianapolis before and after the sale and the installation of the "Dutch oven." These interviews were in response to a request on the part of the buyer that the seller come to their plant and give an outline and an estimate and explain the facts concerning said oven. It appears that the "Dutch oven" is an attachment to the furnace under the boiler and is supposed to lessen the amount of fuel to be used, and likewise to increase the steam capacity of the boilers.

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Following the interviews between the buyer and the seller, the "Dutch oven" was in stalled, and some time thereafter the buyer complained that it was not accomplishing what he had been led to believe would be accomplished. It appears from the evidence that the buyer was thoroughly familiar with what was known as a Dutch oven"; that he had seen them in use and operation; that he was a man of experience in handling boilers and furnaces, so that it may be concluded that each was dealing with the other at arm's length.

The preponderance of the evidence seems to indicate that the installation of this oven did not produce the results that the buyer anticipated. It thus became a question whether or not this failure was due to the fault of the seller or to the fault of the buyer. Many witnesses testified in the court below, with the not unusual conflict that happens in the trial of strongly contested cases.

It was claimed on the one hand that the failure was due to certain causes which the buyer could obviate by a rearrangement and by making some changes in the boiler room which the buyer refused to do. The preponderance of the evidence would seem to sustain the contention that if these changes were made as demanded by the seller, and which he could not make on the premises of the buyer without the consent of the buyer, the appliance that he had sold would work successfully. Expert witnesses in matters of this kind testified on both sides, and while there was a conflict of testimony not altogether easily reconciled, yet this court on a careful review of all the evidence is impelled to the conclusion that the verdict was not against the manifest weight of the evidence. The court below may have correctly reasoned that if the inefficiency of the appliance was due to causes beyond the control of the seller, but subject to the control of the buyer and not removable and remediable without his consent, which he refused to give, though such removal could be readily made, then the responsibility for the failure should be imposed upon the buyer and not upon the seller.

Exception is taken to the charge of the trial court on the question of an express and implied contract. It is true that the

court said in the opening part of his charge to the jury that he would restrict them to the consideration of whether there was an implied contract. Notwithstanding this, the court below during the trial admitted testimony tending to show an express contract, and in the charge itself by way of implication submitted to the jury the question of whether or not the appliance was fitted to do the work for which it was purchased, thus leaving to the consideration of the jury whether the work which it was to accomplish was by virtue of an express or an implied contract: Taking the charge in its entirety it would appear to be more favorable to the buyer than to the seller, and it would not seem in any wise to have been prejudicial to the buyer, but rather to the seller.

The attention of the court has been called to the alleged errors in the admission and rejection of testimony, but it is unable to say that any of these errors, if such they were, were of a character prejudicial to the seller.

Upon a review of all the questions of fact and questions of law the court is of the opinion that there was no error in the proceeding below prejudicial to the plaintiff in error in this case, and the judgment of the court below is hereby affirmed.

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Boyer et al v. Miller et al.

**AS TO THE REVESTING OF TITLE UPON ABANDONMENT OF
THE SPECIFIED USE OF THE PROPERTY.**

Common Pleas Court of Licking County.

FRANK BOYER ET AL V. ALMEDA MILLER ET AL.

Decided, January Term, 1918.

Title—Does Not Revest—Where the Purpose for which Conveyance was Made is Abandoned—No Forfeiture Clause having been Incorporated in the Deed—Consideration Other than that Expressed.

Land conveyed in consideration of one cent to a school board, to have and to hold "in trust for the sole and only use of said district for school purposes and no other" does not revert in the original grantor or his heirs upon abandonment of the use so specified, unless the deed contains a forfeiture clause so providing.

Phil. B. Smythe, for plaintiffs.

Norpell & Norpell, contra.

FULTON, J. (orally).

This is an action which has been submitted to the court upon the pleadings and the evidence. It is a suit begun by the plaintiffs for the purpose of quieting title to a certain piece of land. The plaintiffs are, Frank Boyer, Somerfield Parker, Bert Eswine, Willis Showers and Harry Parkinson, as the board of education of Etna rural school district, Licking county, Ohio. The petition alleges that the plaintiffs are the owners in fee simple by deed from Lyman Turrel, executed and delivered on the 5th day of March, 1835, of the following described real estate situate in the state of Ohio and in the county of Licking, township of Etna, bounded and described as follows:

Being all that certain lot of land known as inlot No. 8, in the town of Etna, in Licking county, state of Ohio, reference being had to the plat of said town recorder's office of said county.

Defendants claim an estate or interest therein adverse to the plaintiffs' right; being a claim in remainder.

The plaintiffs are in the actual possession of said real estate, and have been in the actual and exclusive possession thereof since the said year, 1835. Wherefore they pray that the title to said real estate be quieted against said defendants, and that plaintiffs' title be decreed to be in fee simple, and that defendants' claim be adjudged null and void, and for such other relief as is proper.

To the petition has been filed an answer and cross-petition. It is as follows:

Now come the said defendants and for answer herein say: that they admit that said plaintiffs are in the possession of said real estate, and that said defendants claim an interest therein adverse to plaintiffs. And said defendants deny each and every other allegation in said petition contained.

And further answering said defendants say, that one Lyman Turrel, together with his wife, on the 5th day of March, 1835, in consideration of one cent, to him paid by the school directors of district number two, Etna township, Licking county, Ohio, conveyed said inlot No. 8 in the village of Etna, Licking county, Ohio, to said directors "their successors after successors in office," to have and to hold "in trust for the sole and only use of said district for school district purposes, and no other"; that said premises have been abandoned for school purposes and are no longer used for such purpose or purposes; that said Lyman Turrel departed this life April, 1836; that said defendants are the next of kin and only heirs at law of said Lyman Turrel and that they are now the owners in fee simple of the same; that said plaintiffs are claiming to be the owners in fee simple of said premises, denying the right of said defendants in and to said premises. Wherefore said defendants ask that their title to said premises be quieted against said plaintiffs, and that said defendants' title be decreed to be in fee simple, and the claim of said plaintiffs be adjudged to be null and void and for all other relief to which the defendants are entitled either in law or equity.

To that the plaintiffs have filed their reply in which they deny each and every allegation contained in the defendants'

answer and cross-petition inconsistent with the allegations of plaintiffs petition, and pray judgment as in their petition asked.

Now, here are two sets of people claiming the title to this property in fee simple. The board of education of Etna township claim that it is the owner of this land in fee simple, and the descendants of Lyman Turrel claim they are the owners of this land in fee simple.

I am going to read the deed which was made by Lyman Turrel, It is as follows:

This indenture made this 5th day of March, in the year of our Lord one thousand eight hundred and thirty-five, between Lyman Turrel of the county of Fairfield and state of Ohio of the first part, and Gaylor Uschenshaw, Gilius Bowduet and Ambrose Meeker, directors of school district No. 2 in Etna township, Licking county, and state of Ohio, and their successors in office of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of one cent, to him in hand paid, the receipt whereof is hereby acknowledged hath given, granted, bargained, sold and do hereby give, grant, bargain, sell, transfer and convey unto the said party of the second part all that certain lot of land known by being inlot No. 8 in the town of Etna, in Licking county, state of Ohio, reference being had to the plat of said town in the recorder's office of said county, to have and to hold said lot of land hereby conveyed in trust for the sole and only use of said district for school district purpose and no other, and the said party of the first part for himself, his heirs, executors and assigns against all other person or persons lawfully claiming any part or the whole of the before-mentioned lot of land do and will warrant and defend by these presents. In testimony whereof the said party of the first has by Harmon Turrel, his attorney, legally authorized, hereunto set his hand and seal the date first written.

That is the conveyance that was made of this property to the board of education of Etna township. The petition claims that the board of education of Etna township is the owner in fee simple of these premises, and the petitioner claims that it

is the owner by virtue of the deed that I have read, and the defendants claim title to these premises adverse to the school district or board of education of Etna township, and they ask that that title be quieted, and that plaintiffs' title be decreed to be in fee simple, and that the defendants' claim be adjudged to be null and void and for any other relief that they may be entitled to receive.

The answer and cross-petition claims that the defendants are the owners of this property. They claim that the board of education has abandoned this property, and because they have ceased to use it for school purposes the title reverts to them and that they are now the owners of this property, and they ask the court to quiet the title in them.

This is almost strictly a legal question. There is hardly any controversy between the parties, if there is any at all, as to the facts in the case. There may be a question as to whether or not the board of education of Etna township has entirely abandoned this lot. There may be some question about that. I think the testimony shows that they still have a flag pole on the lot and that the children play on the lot; that they use it as a play ground; that the children play there; but that does not enter into the court's decision of the matter at all.

The court has been cited to two Ohio cases, and I think they are decisive of the matter. The first is in the 58th Ohio State, beginning at page 67, *Village of Ashland v. Greiner et al.* I will read a part of the opinion, which is by Judge Burkett. There had been a conveyance to the village of Ashland for certain purposes. Judge Burkett says:

"The deed of conveyance in question was for the consideration of twenty dollars, the fair value of the half acre at the time of the making and delivery of the deed. The legal effect of a deed, upon such consideration, is different from that of a deed where there is no consideration, other than the purposes for which the conveyance was made. In the one case the grantee acquires the estate for value paid therefor; and in the other it comes to him without price, and in both there may be a stipulation that the estate is to be used only for particular purposes.

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"When value is paid for the estate, such stipulation is construed to be a covenant running with the land, in the nature of a trust, for the uses and purposes expressed in the deed of conveyance, and in case of a breach of the trust, a court of equity will, in a proper action, decree the performance of the trust by confining the uses of the estate to the uses and purposes expressed in the deed.

"In such cases the restricted use of the estate becomes a part of the consideration, and is consented to by the grantee, and it is no hardship on him and his assigns to be compelled to observe the covenants contained in the deed. But in such cases a breach of the covenant restricting the uses and purposes to which the estate is to be devoted, does not have the legal effect to forfeit the estate and reinvest the title in the grantor, his heirs or assigns.

"Whether a stipulation in a deed of gift, or in a will, restricting the uses to which the estate is to be devoted, is only a covenant, or, is a condition subsequent, is not involved in this case, and is not here decided.

"It is clear that the deed in question conveyed away all the title to the premises in the grantors, and that the grantees received all such title, (which was the fee) for the uses and purposes expressed in the deed; and as there are no words of forfeiture or re-entry in the deed, no title whatever vested in the heirs of the grantor, upon breach of the covenant as to the uses and purposes to which the estate was to be devoted."

I am also cited to a case in the 85th Ohio State. It is entitled *The Cleveland Terminal & Valley Railroad Company et al v. The State, ex rel.* It begins on page 251. The facts in this case are that the state of Ohio conveyed certain lands to the railroad company and the railroad company afterwards changed the use of the lands and used them for other purposes than the purposes which were expressed in the deed which was made by the state to the railroad company; and because of that, they brought an action to get this land back, claiming that the parties were not using the land for the purposes for which the deed was made, and that for that reason it reverted to the state and they had the right to bring an action and claim the land.

I will read the part of the decision which I think bears upon this case from page 296:

"This question of jurisdiction does not so much concern ultimate rights of the parties as it does methods of procedure. The right of suitors respecting the subject-matter in dispute will be determined by applying to the facts, when ascertained, the same principles and rules of law, whether the action was commenced in this court in quo warranto or in the court of common pleas by a real action.

"A consequence which follows the application of this doctrine to the present case is that the state must fail in its action for want of a provision in the act and a stipulation in the deed for the revesting of title in the state, if the property should be used for a forbidden purpose. The theory upon which the suit is prosecuted is that the designation for purposes for streets, etc., in the act providing for the grant to the city of Cleveland and carried into the terms of the Governor's deed, operated as limitation upon the rights of the city, and its assigns, to use the premises for other purposes, and that the devotion of the property to the uses contemplated by the lease of the city to the railway company operated as a perversion. But the state in its proprietary capacity is amenable—if we assume that there was a departure from the designated use—to the rule well established in this state that, however it may be with respect to deeds of gift, where deeds rest upon a valuable consideration, and a statement of inducements or purpose with respect to the use of property granted is disregarded, title will not revert in the grantor unless it be in pursuance of a stipulation in the grant that it shall revert."

Now, what are the facts in this case? I have read to you the deed that was made by Lyman Turrel to the board of education of Etna township. There is not a word in that deed anywhere that the title shall revert back to Lyman Turrel or his heirs or assigns in case the property be used for other purposes than that described in the deed. It is true that this deed which was made by Lyman Turrel does say that this property shall be used for school purposes, and for no other. That is true. That is in the deed, and that is a part of the deed. It is claimed by the defendants that those words in the deed cause the property to revert to them whenever the property is used for purposes other than those expressed in the deed. But according to these two decisions which I have read here—and both of them are Ohio decisions—

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that is not so, unless there is an express provision in the deed that when this property is used for purposes other than those which are expressed in the deed it shall revert to the grantor or his heirs or assigns; that it can not revert unless that provision is in the deed. There must be something in the deed—a forfeiture clause or some other clause which substantially says that whenever this property is used for purposes other than those designated in the deed, it shall revert to the grantor or be forfeited to the grantor, or words which would convey the same meaning. This deed has nothing of that sort in it. It does go on to say what this property shall be used for, and it goes on to say that it shall not be used for any other purpose than the purpose expressed in this deed. That is true, but there is not a word of forfeiture in this deed; there is not a word that this property shall revert to the grantor or to his heirs or assigns; and there is no question but what the grantor conveyed away all the title that he had, and the only way that he could get it back would be by a clause such as these two cases say must be in the deed before it can revert. Now because of that fact the court holds that the defendants in this case who claim the property are not entitled to it. It does not revert to them. It does not belong to them. They have no interest in it, because the interest was conveyed away by Lyman Turrel without this proviso which the Supreme Court says is imperative before the title can revert. So the court holds that the defendants have no interest whatever in this property, and as far as their cross-petition is concerned it is dismissed.

The question now arises what the court should do in reference to the petition in this case. The petition asks that the title be quieted as against the claim of these defendants. That the court will do, because the court finds that they have no interest in the property, and the court will grant that request and the title will be quieted so far as the defendants are concerned.

There is one other question and that is as to whether or not these parties can use that property for any other purpose than the purpose expressed in the deed. It was stated that the

board of education was seeking to sell this property or to use it for other purposes than the purpose for which the deed expresses. I am inclined to think, if I were to give an opinion, that the court would compel them to use the property for the purpose for which the deed says it must be used; but I do not decide that matter. That question may remain an open question so far as this case is concerned.

By Edward Kibler: This matter as to the consideration, the court did not mention. The fact that this was only a one cent consideration—would that make any difference?

The Court: I do not think so, in this case. It was argued that it was a one cent consideration, and that that being so, that it was without value, and that, being without value, that it would make a different rule of law applicable to the case. That was argued in this case to the court, and in the briefs. But while that might be so—that a one cent consideration would not be called a valuable consideration—there were other considerations which did take place at that time which might be considered valuable considerations. For instance: This man owned this property. They wanted a school established there, and they wanted a schoolhouse built and provisions made for a school, and they made the deed upon that consideration; the board of education went to work and they spent their money and established a school there and built a schoolhouse and kept a school there for a great number of years. I do not think that that cuts any figure in this case, but if it did, I believe that this court would hold that that was a valuable consideration, because the board of education expended money in that matter in such a way as to make them owners of this land for a valuable consideration.

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**RULE OF CUSTOM AS TO SHIPMENTS RENDERED INAPPLICABLE
BY WARTIME RAILWAY CONTROL.**

Common Pleas Court of Franklin County.

WILLIAMS-DONAHUE COMPANY v. A. FELTY.

Decided, November 30, 1918.

Custom and Usage—Contracts Ordinarily Interpreted with Reference to—Rendered Unenforceable where Wartime Conditions Have Forestalled Carrying out of Agreements—Shipments of Grain Made Impossible by Railway Embargo and Harmful Weather Conditions—Custom and Usage Can Not Continue an Obligation, When—Proof as to Custom—Construction to be Placed on the Phrase "Reasonable Time."

1. While evidence as to custom and usage is inadmissible to vary the obvious meaning of words used in a written instrument, it is competent for the purpose of explaining the meaning of the instrument as a whole.
2. The usages of a particular line of trade are valid and contracts made in that line will be deemed to have been made with reference to them, where they are found to be reasonable and to have been so generally adopted by persons in that trade as to raise the presumption that they are known to all persons engaged in it.
3. But custom and usage can not establish what would constitute a reasonable time within which to carry out a contract, the further execution of which was stopped by unforeseen and impossible conditions.
4. The obligation of a grain dealer, based on custom and usage, to make contract deliveries within a reasonable time after the lifting of the railway embargo which had prevented earlier shipments, is inapplicable where the embargo was due to a world war with America participating therein, complicated by a car shortage, railway congestion and the prevalence of severe winter weather and heavy snowfall which rendered it impossible that corn shipped a long distance would remain sweet and dry.

L. M. Sandler and J. F. Rogers, for plaintiff.

T. H. Clarke and C. M. Addison, contra.

KINKEAD, J.

Plaintiff seeks to recover \$1,440 as damages for breach of contract. The petition alleges that on October 10, 1917, the parties made a contract whereby defendant sold plaintiff ten cars of new yellow corn of twelve hundred bushels each, the same to be delivered to plaintiff at Boston, Mass., at the price of \$1.33 per bushel.

Defendant claims the contract called for new yellow corn, cool and sweet, to be shipped to Boston rate points, destination to be designated by plaintiff when called for by defendant. Defendant claims that the exemptions contained in the contract relieve him from his obligation because of war conditions, embargo and weather conditions resulting in excessive moisture in the corn so that it could not have been shipped to Boston points without destruction from excessive heat resulting from such moisture during transit.

Plaintiff admits that the embargo and conditions of shipment as alleged, but avers that "it is a custom with the Grain Dealers Association to allow a reasonable time to deliver grain after embargoes, strikes, car shortages and other causes beyond seller's control, are removed." Plaintiff avers in the latter part of December, 1917, and again on January 2, 1918, defendant refused to carry out the contract at any time in the future.

Jury was waived and trial was had to the court.

The claim of counsel and parties is, whether an alleged custom among grain dealers will operate as a continuance of the obligation to deliver the corn to a period beyond the time stipulated for shipment, or until a reasonable time after embargo is lifted.

By the contract defendant agreed to sell plaintiff:

"Ten cars of New Yellow corn (1200 Bu. each) at \$1.33 cost and freight to Boston Rate Points. Time of shipment December shipment (Gtd. Cool & Sweet) Destination. When called for. Final destination to be given. Remarks. Subject to embargoes, strikes, car shortages, and other causes beyond sellers control. Buyer to pay any advance in freight, if any. Should railroads raise size of cars average to be figured at the market price on date of shipment."

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December 8, 1917, defendant called on plaintiff for billing at once and to points not embargoed, through hauls not junction points. Plaintiff sent billing points December 19, 1917, for eight cars, only one of which was for Boston points. December 19, 1917, billings were sent for the two, neither of which were for Boston points. Cancellation was made of two cars December 21, 1917, and December 27th billing was given for one car at Elizabeth, N. J.

Defendant's letter of December 8, 1917, calling for billings, also stated:

"These loaders may call me up any moment for billing and not being able to get it out, will let the orders go overboard, as they can not hold this corn back indefinitely until some future time when embargoes are raised or cars furnished."

Letters passed between the parties in November. Defendant wrote the brokers through whom contract was made that the quality of corn was poor. The broker's reply to defendant was that this seemed to be the situation, suggestion being made that it would be hard to "know where people are going to get off who have November and December shipment corn sold here (Boston), and seems like a foregone conclusion that it would be out of condition."

The brokers thereupon suggested to defendant that it would be well

"to buy your corn that you have sold from somebody else down here, and let them take the risk of handling hot corn. If you feel this way, and will give us your limits we will do the best on it than we can for you."

The matter culminated, however, by defendant's writing plaintiff December 29, 1917, as follows:

"Impossible ship corn conditions beyond my or any human control."

January 2, 1918, plaintiff notified defendant that within twenty-four hours it would buy the corn on defendant's account and

charge loss to him. Mr. Williams of plaintiff company personally called upon defendant at Columbus, and desired to know if he ever intended to fill his contract according to its terms. Defendant replied in the negative, claiming that the contract was not good "one minute after midnight on the 31st of December," stating that he never would ship the corn.

Oral testimony has been offered concerning an alleged custom or usage prevailing among grain dealers in respect to the trade meaning and understanding of the words in the contract, viz:

"Subject to embargoes, strikes, car shortages, and other causes beyond seller's control."

It is well settled that evidence of custom and usage is admissible to explain the meaning of a written instrument. Such evidence is inadmissible to vary the obvious meaning of words used, but it is competent for the reason that by law the custom becomes part of the contract. 12 Cyc., 1081.

If a custom is general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him. (*Horan v. Strachan*, 86 Ga., 408, 22 Am. St., 491.)

Parties are presumed to have dealt with reference to a general custom, and in order to correctly interpret their intentions. (*Bowman v. Bank*, 9 Wash., 614, 43 Am. St., 870.) A custom, if known to the parties to a contract to which it relates, is held obligatory. (*Bank v. Fiske*, 133 Pa. St., 241, 19 Am. St., 635, and note.) Knowledge of a usage may be inferred from circumstances or implied from its notoriety. *Barry v. Ry.*, 98 Mo., 62, 14 Am. St., 610. See 10 Am. St. Rep., 826, note.

Where goods are "to be taken by" a certain time, custom is admissible to show that these words meant as the purchaser might from time to time specifically order, and that if all were not ordered within the time specified it was customary to send the purchaser a bill for the balance, and to hold such balance subject to his order for a reasonable time. 12 Cyc., 1085; *Atkinson v. Truesdell*, 127 N. Y., 230.

Usage and custom can not alter or contradict express or implied terms of a contract free from ambiguity, nor make the

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legal rights of liabilities of the parties to a contract other than they are by the terms of the contract (78 O. S., 358; *Hopper v. Sage*, 112 N. Y., 530, 8 Am. St., 711, and note 775); but usages of trade, if reasonable, and so generally adopted by persons engaged in a particular branch of business as to raise the presumption that they are known to all persons in that business, are valid, and contracts made in that business will be deemed made with reference to them. *Clark v. Baker*, 11 Md., 186, 45 Am. Dec., 199, and note 202.

Assuming that there is a well-established and understood custom in respect to the implied obligation of grain dealers to deliver grain sold under contract within a reasonable time after an embargo, custom or usage does not and can not settle or establish the question of reasonable time. It becomes a question of fact as developed by the special facts, circumstances and conditions.

It has been held that a general dictionary of the English language is not to be considered an authority to show on trial the meaning of a word which is relied upon as deriving a peculiar meaning from mercantile usage. (*Houghton v. Gilbert*, 7 C. & P., 701; 32 Eng. C. L., 829.) Quite true. Embargo as defined by Webster's International dictionary is "To lay or put an embargo on, as ships or commerce. An edict of the government prohibiting departure or entry of ships or commerce. It may be absolute or partial. A stoppage, or impediment; a prohibition."

Bouvier's Law Dictionary contains nothing modern or helpful, the definitions furnished by this book having no relation to the modern common use of the word.

"Words and Phrases" furnishes the most appropriate definition, taken from *C. & O. Ry. v. O'Gara*, 139 S. W., 803, 806; 144 Ky., 561, as follows:

"An embargo is a notice, issued by a common carrier, refusing to receive or carry certain kinds of freight on its line, or between certain points, and may be for a limited and definite period, or for an unlimited or indefinite period. It is the result of a congestion of business that makes it impossible for a road to carry all the freight."

The probability of the time of a shipment specified to be at a given time being wholly dependent upon the duration, character and extent of an existing embargo or shortage of cars, it is reasonable to conclude that a well-settled custom or usage prevalent in a particular line of trade may appropriately be resorted to for the purpose of reducing the contractual obligation to a reasonable certainty.

Pursuant to the foregoing rules and doctrines the conclusion is that the evidence establishes a trade usage and custom that there is an obligation to ship the grain within a reasonable time after the removal of an embargo.

But where the embargo as in this case is of such nature, character and extent as that brought about by the world war and American participation therein, with the shortage of cars consequent therefrom; where as disclosed by the evidence it continues for a long and indefinite time, which combined with the unusually hard winter and great snowfall which continued for such great length of time as to make it "admittedly impossible" to ship the corn to such long distance as Boston rate points it must be concluded and found that the embargo continued for such unreasonable time as to render inapplicable the rule of custom and usage contended for to the circumstances disclosed by the evidence, as well as that the defendant did not have, and could not have the reasonable time or opportunity to ship after embargo congestion removed, and that other causes made it impossible to comply with the contract.

The position of plaintiff, however, is that defendant having repudiated the contract and declined to fill the order, he may nevertheless be held. The contention is unsound for the reason that it is found from the evidence to have been impossible to have shipped the corn to Boston points for a period of three or four months or more. The congestion and shortage of cars is found to have continued practically to the present time.

The usage and custom found to have existed among grain dealers can not reasonably be held to apply to such conditions as have prevailed since the entry of this country in the war, and the governmental control of the railroads. The evidence dis-

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closes that agencies for the shipping of western freight by far eastern roads to Boston points were put entirely out of business—so impossible has it been, and still is, to safely ship corn cool and sweet to such destinations. It is undisputed that at no time has it been possible to safely ship such corn through to such points.

It was suggested in plaintiff's evidence that defendant could have had the corn dried so he could have shipped it, making some adjustment. That would have been making a new contract. He was under no obligation to do this.

Responding to the contention that defendant can be held liable to respond in damages because he repudiated the contract, it may be observed that he could be held responsible in this action only in case he failed to ship the corn within a reasonable time after the removal of the embargo or congestion. The evidence fails to show that it has been possible to ship the corn at any period since; the railroads are still in the hands of the government, and the evidence fails to show that the restriction on shipping corn eastward to Boston points has yet been removed.

It would be unreasonable to hold defendant to an implied obligation based on such claimed custom or usage here shown, under such war time conditions and restrictions to even ship in the spring months. The evidence fails to disclose that the corn could then safely be shipped.

To sustain plaintiff's petition the court would be required to do so upon the basis of an implied obligation to ship the corn within a reasonable time after the suspension of the impossibility to ship. It can not be done because of defendant's flat repudiation of the contract. The evidence fails to show there has ever been a time when conditions would have warranted enforcement of the obligation.

To require him to accept his leases and adjust the difference between the market prices two, three or half a dozen months subsequent to December does not appeal to conscience or equity under the conceded conditions in this case. We have upheld the contention of plaintiff to the extent of agreeing that custom or usage may continue the obligation for a reasonable time after release of embargo and removal of embargo, but to render a

judgment for what plaintiff asks here under the conceded facts and under the unusual war time conditions would be the grossest kind of injustice. A demand for an adjustment of the seller's loss by payment of some sum to the purchaser might possibly be morally and legally proper in some instances, but it would have been quite unjust in this case.

Plaintiff is successful in securing an approval of its claim of the contract established by usage in general, though not to the unusual war conditions shown, but must fail in its prayer for judgment.

It is not necessary in order to prove a valid custom that all the witnesses on both sides of the case should agree concerning it. Testimony of one witness who has adequate means of knowledge may be sufficient to prove the existence of a usage in a given trade or business. 12 Cyc., 1101; note 31.

No doubt there is a difference in the nature and custom of selling between local buyers from local elevator men who make local purchases, and general grain dealers and brokers covering a general field in the east, north and west. The court so concludes from the evidence, and believes the custom contended for prevails among the realers in the larger field of trade, but as stated such custom and implications therefrom can not be held to the unusual conditions created by the war and governmental control of railroads and freight shipments. The character of railroad control and shipments have for the time rendered it impossible to adequately and equitably apply the rule of custom contended for in the case.

But plaintiff must fail by reason of the impossibility to ship the corn cool and sweet because of the undisputed conditions of moisture disclosed.

The finding and judgment is in favor of the defendant.

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ALLOWANCES TO COUNTY OFFICES.

Common Pleas Court of Franklin County.

IN THE MATTER OF HOMER Z. BOSTWICK, PROBATE
COURT—APPLICATION CONCERNING
ALLOWANCE.

Decided, December 23, 1918.

*Limitation on Time for Official Action—Determination as to Whether
a Statutory Provision is Directory or Mandatory—Method of In-
terpreting the Words "Shall" and "May"—Transfers from the
General Fund to Officer's Fee Fund.*

Where the allowance for clerk hire, etc., for a county office is found to be inadequate to meet the necessary expenses of that character for the year it was intended to cover, and the allowance has been kept within the maximum amount which may be made for that office, it is competent for the county commissioners, upon application being made in that behalf, to amend or add to the sum so fixed an amount sufficient to complete the year, if not greater in the aggregate than the maximum fixed by law, notwithstanding such action is taken more than five days subsequent to the 20th of November, the date fixed by Section 2980 for the filing by such officers of a statement in detail of the probable amount which will be required to meet office expenses for the year beginning the first of January following.

KINKEAD, J.

Application is made for an order concerning an allowance for clerk hire in the office of the probate judge. November 22, 1916, Samuel L. Black, then probate judge, requested the board of commissioners to make an allowance of \$16,500 for clerk hire for the year beginning January 1, 1917. The earnings of the office for the year ending September 30, 1916, reported to the auditor were \$33,923.53. Out of this sum the commissioners could have allowed a maximum of \$24,135 but allowed the sum of \$16,500 on November 23, 1916, for the year beginning January 1, 1917, in accordance with Section 2980-1, General

Code. It was stipulated in such order that probate judge Black should be allowed to expend \$1,763 for clerk hire for the period from January 1, 1917, and ending February 8, 1917.

February 6, 1917, it was apparent that the allowance made November 30, 1916, for the year 1917, diminished as it was by \$1,763 expended by Judge Black, would be inadequate for the remaining portion of the year. It was shown that many records were left incomplete in the former term, and it was apparent that additional allowance for clerk hire to bring up the back records was essential. Therefore the county commissioners unanimously voted a resolution to amend their allowance of November 22, 1916, by increasing the amount allowed the probate court to the sum of \$16,970, making in substance an additional allowance of \$2,233 for the period beginning February 9, 1917, and ending December 31, 1917. This allowance was made February 6, 1917. The total allowances thus made lacks the sum of \$5,402 of being as much as \$18,733 which could have been allowed for that year.

Under Section 2980 it is provided that:

"Not later than five days after the filing of such statement (by the county officer to be filed November 20th each year) the county commissioners shall fix an aggregate sum to be expended for such period," etc. (This is the next year beginning January 1st, 1917, in this case.)

Section 2980-1 (amended 105-6 O. L., 14) in substance provides that the aggregate sum so fixed in any year shall not exceed for any office, an aggregate amount to be fixed by computation upon earnings of such office for the preceding year ending September 30th.

In other words, the commissioners may make an allowance up to the limit or aggregate sum permitted under the statute based upon the earnings.

Section 2980-1 contains the provision:

"Provided, however, that if at any time any one of such officers require additional allowance in order to carry on the

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business of his office, said officer *may* make application to a judge of the court of common pleas," etc.

This action requires the judge to hear such application and if he finds a necessity exists, he may allow such sum as he deems necessary for the purpose.

The amendment in 105 O. L., 14, requires notice of the application to be given the county commissioners, and that such board *shall* file in such proceeding their approval or disapproval of the allowance asked.

Another provision may be pertinent, namely, that when the term of an incumbent shall expire within the year, the county commissioners shall at the time of making the allowance, designate the amount thereof which may be expended by the incumbent and the amount to be expended by the successor.

It is to be noted that the action taken by the commissioners on February 6, 1917, two days before Judge Bostwick entered upon his office, was characterized as an *amendment* of the allowance of November 22, 1916, by increasing the amount to the total sum of \$16,970, which was not in excess of the amount which the commissioners could allow under the statute.

The difference of opinion seems to be the power and authority to make allowances subsequent to the date fixed by statute for allowance by the county commissioners, namely, "Not later than five days after the filing of such statement," November 25th of each year.

It is understood that the state auditing department and the Attorney-General has so interpreted the statute that after the county commissioners have made one allowance, subsequent applications for additional allowances *must* be made to a judge of the court of common pleas; that the county commissioners can not *amend* the allowance at a later period or increase the allowance where the total allowance is kept within the maximum amount which the commissioners are permitted to make. The view taken by the state department is that the increase or additional allowance made by the commissioners February 6, 1917,

was unauthorized and illegal; that it could only be made by application to a common pleas judge. The court does not coincide with this view; it is not founded on well settled rules of interpretation.

The question depends upon the character or extent of the power conferred upon the respective officials—upon the meaning of the law. It will not be denied that the power conferred upon both commissioners and judge is administrative and not judicial.

The commissioners are vested with discretion; the statute requires that the sum allowed "*shall be reasonable and proper*"; they may make an allowance up to the full extent authorized or of a less sum.

Whether the commissioners were authorized at any time within the period of the year 1917 and subsequent to the date fixed by statute for making the same, to-wit, "not later than five days after the filing of such statement," or subsequent to November 25, 1916, to make an amendment of their original allowance, increasing the total amount for the year, but not beyond the maximum fixed by statute, will depend upon the following questions:

1. Are the limitations of the time of official action prescribed by Section 2980 mandatory or directory merely?

2. May the commissioners at any time allow the aggregate sum or any less sum within the limitation of the maximum amount?

3. Or after having made one allowance less than they could have made, is the provision that "*if at any time * * * such officers require additional allowance*" "*said officer may make application to a judge.*" etc., mandatory, and does it require that all applications for allowances subsequent to the first one made by the commissioners shall be made to a judge?

A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Wheth-

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er a statute is mandatory or directory does not depend upon its form, but upon the intention of the Legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. When a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, the provision may be generally regarded as directory. 36 Cyc., 1157, 1158.

A statute specifying a time within which a public officer is to perform an official act regarding the rights of others is directory merely, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation upon the power of the officer. 36 Cyc., 1160. The word "shall" is to be construed as merely permissive, where no public benefit or private right requires it to be given an imperative meaning. 36 Cyc., 1161.

Judge Spiegel quite accurately states the rule in *State v. Board*, 8 N. P., 186, 189:

"An act in which the Legislature makes both words 'shall' and 'may,' applicable to the same subject-matter, will be construed to be mandatory only where public interest or rights are concerned, where the public or individuals have a claim *de jure* that the power should be exercised, or where something is directed or to be done for the sake of justice. In such cases only an intent is to be inferred that, in using both a facultative and mandatory phrase for the performance of the same act, the Legislature really meant to enjoin an imperative duty." See *People v. Board*, 33 Cal., 487.

The county commissioners are clothed with unequivocal power to fix or determine the amount to be allowed for clerk hire at any time and for any amount within but not beyond the maximum sum defined by statute.

This conclusion is reached by application of well settled fundamental rules of statutory construction hereinbefore set

forth. The rule by which the word *shall* is read *may*, and *may* is read *shall* when the portion of the statute wherein the word *shall* is used directory only, and that part of the statute wherein *may* is used is mandatory, and must be interpreted to mean *shall*, is axiomatic.

Sections 2980 and 2980-1 as amended in 105-6 O. L., 14, 15, being parts of the same original act must be construed and interpreted as one act, having for its purpose the making of provision for employment and compensation of clerks, deputies and assistants of probate judges, county auditors, county treasurers, clerks of court of common pleas and sheriffs.

It is to be noted that Sections 2980 and 2980-1 confer express power upon the commissioners to "fix an aggregate sum to be expended" and prescribes the mode of fixing the aggregate sum to be expended in any year for clerks, etc., as well as the express power of determination by a judge of the necessity of an "additional allowance in order to carry on the business of his office," as he deems necessary.

The rules of statutory construction—whether the rules concerning the mandatory or directory character are to be applied in aid of a true interpretation of the two provisions depends upon the general purport and intent of the act.

The commissioners are authorized to fix an aggregate sum to be expended for the period, which

*"aggregate sum so fixed by the county commissioners to be expended in any year * * * shall not exceed * * * an aggregate amount to be ascertained by computing"—(according to the percentages on the amount of) "fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official service during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowances in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas * * * and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary, etc., * * * and thereupon the board of county*

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commissioners shall transfer from the general county fund, to such officers' fee fund such sum of money as may be necessary to pay said salary or salaries."

It is thus made apparent and clear that the *aggregate sum so fixed by the commissioners* may be the full amount of the maximum allowed, and that the amount which they *may* make *must* come out of the "officer's fee fund."

It is also made clear and certain that a judge of the common pleas court is given no power whatsoever to make an additional allowance to be paid out of the "officer's fee fund."

The *additional allowance* which the judge is expressly authorized to make is mandatorily required to be taken from the *general county fund* and transferred by order of the county commissioners to the *officer's fee fund*.

It thus is clearly manifest that the settled rules of statutory construction heretofore set forth, that the word *shall* in Section 2980, viz., "not later than five days, etc., * * * the county commissioners *shall* fix an aggregate sum," etc., must be construed *may* in accordance with the general intent and purport of the statute, because the amount of any additional allowance made by a judge can not be ordered paid out of the "officer's fee fund," but is only to be paid out of the fund ordered by the commissioners to be transferred from the general fund to the fee fund.

It is equally clear that the word "*may*" in Section 2980-1, "said officer *may* make application to a judge," etc., is to be read *shall* for the quite obvious reason that the judge is given no express or implied power to order an additional allowance out of the fee fund, being on the contrary expressly authorized to make an additional allowance to be paid out of a fund transferred by order of the judge from the *general county fund* to the officer's fee fund.

The familiar doctrine quoted from the opinion of Spiegel, J., in *State v. Board, supra*, is particularly applicable to the two Sections, 2980 and 2980-1, and will bear repetition in this connection:

“An act in which the Legislature makes both words *shall* and *may* applicable to the same subject-matter, will be construed as mandatory only where the public interests or rights are concerned,” etc.

When permissive and optional and a mandatory phrase, the intent and purpose may be gathered from the general purpose and effect of the act.

It is made clear that a judge is not authorized to make an additional allowance out of the officer's fee fund so that it is apparent that the two sections mandatorily require the commissioners to make the allowances that are to be paid out of the fee fund, and that the judge has power only to make an additional allowance when that fund is exhausted and which shall be paid out of the general county fund.

This discloses the wisdom of requiring that there shall be a full hearing of the application before the judge, and the commissioners whose special province it is to handle the general finances of the county shall give their approval or disapproval, as well as the right to appear at such hearing and to offer evidence. Nobody knows better than they whether the county can afford to have an additional allowance for clerk hire to be paid out of the “general county fund.”

It is also clear that the direction of Section 2980 as to the time of making the allowance by the commissioners is a mere matter of convenience, having a view to the proper, orderly and prompt conduct of business.

The nature of the act of fixing the allowance by the commissioners is not such that it is to be regarded as a limitation upon their power, or that it is of the essence of the thing to be done.

The use of the word *shall* in Section 2980 (the commissioners *shall* fix an aggregate sum) in connection with the word *may* in Section 2980-1 (providing that a judge of the court of common pleas *may* allow such sum as he deems necessary, etc.), can not be construed as mandatory so far as concerns the commissioners on the ground that the public interests are affected

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where the commissioners have not exercised their discretion concerning the vital matter and where they have kept their action entirely within the letter and spirit of the law.

The judgment of the court is that the action of the commissioners was lawful and should be approved, for the reason that the commissioners in making the amended allowance of February 6, 1917, did not exceed their power, and their action was lawful and within the maximum amount which they were permitted to allow.

IRREGULARITY IN PROCEEDINGS FOR IMPROVEMENT OF INTER-COUNTY HIGHWAY.

Common Pleas Court of Knox County.

STATE, EX REL CHARLES D. HAYDEN, v. A. V. DONAHEY.
AUDITOR, ET AL.

Decided, February 11, 1918.

Auditor's Certificate—As to Unappropriated Funds Applicable to a Given Purpose—Requirement that Such a Certificate be Filed is Directory, and Not Mandatory, When—Road Improvements—Injunction Against, Will Not be Granted on Petition of a Tax-payer—Where There is a Moral Obligation to Pay and no Relief Would Result to Tax-payers.

1. The passage of a resolution by a board of county commissioners, appropriating money for the improvement of an inter-county highway under "state aid law," without the auditor having first certified that the necessary funds for such improvement were then in the county treasury or in process of collection and not otherwise appropriated as directed by Section 5660, General Code, is irregular, and of itself can have no binding effect upon the county; but where such funds were in fact at the time in the treasury or in process of collection and not otherwise appropriated, and the auditor within five days did make and file such certificate, and thereafter a contract for such public improvement was duly

let, such contract will not be rendered void by reason of such irregularity.

2. In such case, this statute is directory and not mandatory as to the order in which the various steps are taken leading up to the letting of the contract—that which was done having “substantially accomplished the purpose of the statute.”
3. Where there is a moral, although not a legal obligation on the part of a county to pay for a public improvement, a court of equity will not interfere by injunction at the suit of a tax-payer, where it appears that the relief sought would not benefit the tax-payers whom the relator represents.
4. Bad management on the part of the state highway commissioner under authority of Section 1209, General Code (Cass law, Section 202), in the prosecution of this improvement after taking charge, will not justify a court interfering by injunction.

Charles D. Hayden, for plaintiff in error.

C. H. Duncan, contra.

BLAIR, J.

This case was heard upon the pleadings and evidence, including an agreed statement of facts.

The relator brings this action for and on behalf of himself and other tax-payers of the county, seeking to enjoin the state and county officials named as defendants from further proceeding to improve a section of highway known as section one of the Columbus-Millersburg Inter-county Highway, No. 23, lying within this county, alleging that the contract for such improvement is illegal and void, by reason of numerous alleged irregularities in the proceedings leading up to the execution of such contract, as well as subsequent thereto.

On April 10, 1916, the commissioners of this county passed a resolution to improve this section of highway lying within this county, under what is known as “state aid law,” and appropriated for such improvement the sum of \$41,000, the balance of the estimated cost to be borne by the state, under the supervision of the state highway commissioner.

The evidence shows that the necessary funds for this appropriation were then in the county treasury to the credit of, or had

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been levied and placed upon the duplicate, and in process of collection for state and county road improvement fund, and not otherwise appropriated. In this resolution the county commissioners agreed to assume in the first instance the county's share of such costs and expenses as is required by Section 1218, General Code (Cass law, Section 211).

On April 15, five days later, the county auditor filed a certified copy of this resolution with the state highway commissioner, and on the printed blank for that purpose following the certificate to such copy the further certificate of the auditor is added to the effect that the money required for the payment of the county's portion of said improvement was in the treasury, or in process of collection. This last mentioned certificate also bore date of April 15, 1916. A like copy of this resolution with identical certificates was placed on file in the county auditor's office of this county, the auditor being clerk of the board of county commissioners. This resolution, as to form and legality, was approved by the Attorney-General on April 19, 1916, and his approval endorsed upon the copy filed with the state highway commissioner. Thereafter the state highway commissioner entered into a contract bearing date of April 28, 1916, for the construction of this section of highway, with the Mansfield Construction Co., and this construction company gave a bond for the faithful performance of its contract. The commissioners of this county approved and signed this contract on May 15, 1916, and the Mansfield Construction Co. soon thereafter began work upon said improvement under said contract. After a large amount of money had been expended in the prosecution of this improvement, the state highway commissioner, on May 5, 1917, determined that this construction company was not carrying forward the work with reasonable progress, and thereupon, under the authority given him by Section 1209, General Code (Cass law Section 202), took charge of and proceeded with the construction of said improvement, with the purpose of completing the same in accordance with the terms of said contract, and charging the excess cost of construction, if any, to the Mansfield Construction Co., and collecting the same from said company

and its bondsmen, as is authorized by said Section 1209, General Code.

The principal irregularity relied upon by the relator is the fact that on April 10, 1916, when the county commissioners passed the resolution above mentioned, to pay the county's portion of such expenses in accordance with the requirements of Section 1218, General Code, the county auditor had not then certified that the necessary money was in the treasury to the credit of such fund, or that it had been levied and was in the process of collection, as is required by Section 5660, General Code, it being claimed by the relator that the filing of such certificate is a necessary prerequisite to the right of the commissioners to pass such resolution, and that the failure of the auditor to first so certify renders the subsequent action of the commissioners in passing this resolution void, as well as the subsequent action of the state highway commissioner and county commissioners in the letting and execution of this contract.

Section 5660, General Code, reads as follows:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

In support of relator's contention a number of cases are cited where in not only our lower courts, but our Supreme Court as

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well, have held that county commissioners and other public officers mentioned in this section may not enter into binding contracts, unless the auditor or clerk has first certified as to the requisite funds, and that this section is mandatory and not directory; that the officers named are without authority to bind the county, township or board, as the case may be, in the absence of such certificate having been made. Most of these decisions, however, arose in cases wherein it was sought to recover on such contract, and not in cases where such improvement was sought to be enjoined by a tax-payer. Our Supreme Court, in the case of *Emmert v. Elyria*, 74 Ohio St., 185, in its application of this law, recognizes a distinction between cases wherein payment is sought to be enforced and a suit by a tax-payer to enjoin such improvement. This last cited case was a suit by a taxpayer against the city of Elyria to enjoin the city from paying for a paving improvement. After a review of the cases recognizing the necessity of the certificate of the auditor to enable the city to make a binding contract, the court in its opinion, on page 194, makes the following comment:—

“But because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so, or that a court, because it will not enforce payment, will enjoin it.”

If the state highway commissioner in the present case be permitted to pursue his present course in the prosecution of this work, it is clear that this improvement will cost Knox county only the \$41,000, most of which has already been expended in the prosecution of this work, while if the temporary injunction heretofore granted be allowed to stand, the amount already expended would be almost if not altogether a total loss, unless this improvement be completed by the letting of another contract; and in the fact of the present high prices of both material and labor, this could not now be done except at a greatly advanced cost. In other words, to make this injunction perpetual would be to impose upon the tax-payers of this county an additional burden, instead of giving them relief, while the Mans-

field Construction Co. and its surety, the bonding company, are the only ones who could or would profit by such injunction.

While on equitable grounds I do not think this injunction should be permitted to stand, I do not base my finding upon this ground alone, for in my judgment the contract entered into for this improvement can be upheld upon legal grounds. In many, if not all, the reported cases where in this law requiring such auditor's certificate has been upheld, such certificate had never been filed, either before or after the letting of the contract, while in the present case it must be remembered that the certificate of the auditor had been made and filed both in the commissioners' office and with the state highway commissioner prior to the letting and signing of the contract by the highway commissioner and county commissioners.

The real object and purpose of Section 5660 is to prevent commissioners and other officials entering into binding obligations for the expenditure of public funds until such funds are either in the treasury or have been levied and in process of collection for that purpose. These funds had not only been provided, but the auditor's certificate had actually been made before either the state or county assumed any obligation under the contract in question. The purpose of the resolution of the commissioners of April 10, 1916, was to comply with the requirements of Section 1218, General Code (Cass law, Section 211) which requires the commissioners to make a written agreement to assume in the first instance that part of the costs and expenses over and above the amount to be paid by the state. The Attorney-General evidently thought it immaterial whether the certificate of the auditor bore an earlier or a later date than that of April 10, for he approved this resolution as to form and legality, as required by Section 1218, with the auditor's certificate before him bearing date five days later than the date of the resolution. If it be conceded that this resolution was not binding upon the commissioners because the auditor's certificate had not been made at the time of its adoption, in my judgment the action of the commissioners thirty-five days later, in approving and signing the contract for such improvement, amounts to a ratification of

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such resolution, this being thirty days after such certificate of the auditor had been made and filed. This resolution could have no force and effect as an agreement until it had been filed with the state highway commissioner and approved by the Attorney-General, in accordance with the provisions of Section 1218.

The resolution, the certificate of the auditor and the approval of the Attorney-General, all filed in the office of the state highway commissioner, go to make up the agreement, and until all this had been done such resolution did not amount to an agreement. The last thing then done to transform this resolution into an agreement was the approval of the Attorney-General, which occurred three days after the certificate of the auditor had in fact been made and filed.

While Section 5660 no doubt is mandatory in requiring the certificate of the auditor as to the necessary funds in order to give the commissioners authority to make a binding contract, yet I can not bring myself to believe that the order in which the commissioners take the various steps leading up to the letting of the contract is of such vital importance as to render such contract void, where in fact all the necessary steps have been taken by them prior to the actual letting of the contract. In the various cases cited and relied upon by relator, the certificate of the auditor or clerk as to the necessary funds had never been filed, showing a disposition on the part of such boards to completely ignore the requirements of this section of the statute, while in the present case the evidence would indicate that the commissioners had every purpose to comply with the requirements of this section fully, and there is no irregularity other than the order in which these various steps were taken.

It is well settled that a statute prescribing duties of public officials will be held to be directory and not mandatory in "cases where that which has been done substantially accomplishes the purpose of the statute." The purpose of this statute has been as effectually accomplished as it would have been had the certificate of the auditor borne a date earlier instead of later than that of the resolution of the county commissioners above referred to.

I find no justification for the claim that the commissioners are seeking to relieve the abutting property owners and townships from bearing their proper portion of the expense of this improvement. It is in evidence that this apportionment is contemplated as soon as it can lawfully be made.

Irregularities on the part of the highway commissioner, occurring since the execution of this contract, are urged as a reason for granting the relief sought, but I find no such irregularities as would justify a court in stopping this improvement.

An entry will be placed upon the journal of this court dissolving the temporary injunction heretofore granted, and dismissing the petition, and assessing the costs against the relator.

A motion for a new trial, if made, may be overruled, and exceptions noted.

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STATUS OF ALIEN ENEMIES IN COURTS OF JUSTICE.

Common Pleas Court of Hamilton County.

ALEXANDER HAU ET AL V. C. A. HEILKER, EXECUTOR, ET AL.

Decided, January, 1919.

Aliens—Non-Resident Enemy Aliens—Without Standing in the Courts During Continuance of War—Trading with the Enemy Act—Distinction Between Alien Enemies and Alien Friends—Possible Rights of Alien Enemy Property Custodian Not Determined.

Citizens of a belligerent country who are resident therein are without capacity to maintain actions against citizens and residents of a country with which they are at war. This disability continues so long as the two countries remain at war, but is removed by the declaration of peace. The effect of such disability is to postpone the commencement of an action by an alien enemy during continuance of war; or, if an action has been begun, to suspend its further progress until the return of peace.

Heilker & Heilker, for the motion.

Powell & Smiley, contra.

NIPPERT, J.

This is an action brought by plaintiffs to set aside the will of Frederick Hau, who died on the 29th day of October, 1916, and whose will was admitted to probate in the Probate Court of Hamilton County on November 9, 1916.

Plaintiffs filed their petition to set aside the will on November 5, 1917. They were, at the time of the filing of their petition, and are now, residents and citizens of Germany.

The defendant executor filed a motion to dismiss the petition on the grounds:

1. Because the action can not be maintained by citizens of a belligerent country, resident therein, against citizens of a country with which they are at war.

2. That the power of attorney under which this action was filed is of no effect because it was given at a time when a

state of war existed between the United States and Germany, and if executed and given before a state of war existed all rights thereunder are terminated by the declaration of war.

The court will first consider the rights of plaintiffs as non-resident enemy aliens, residing in a country with which the United States is at war, to bring an action against a citizen of the United States during the period of hostilities.

Alienage alone does not constitute a general disability to sue in our courts, but only alienage combined with the character of enemy. An alien friend has a right to sue in any court. An alien enemy is incapable of suing while he remains an enemy. While the question of alien friend is not raised here, the court desires to record the distinction between alien friends and alien enemies, as there seems to be a widespread misconception of the rights of alien friends and alien enemies though both being citizens of a country with which the United States is at war.

According to Justice Story—

“Alien friends come into the country, either with a letter of safe conduct, or under a tacit permission, which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of the country where they reside. But if the right of suing for redress of injuries which they receive were not allowed them, the protection afforded would be incomplete, and merely nominal. This claim to the protection of the courts of the country does not apply to those aliens who adhere to the public enemies of the country. They seem, upon every principle, to be incapacitated from suing either at law or in equity. * * * The disability to sue is personal. It takes away from the public enemies the benefit of the courts of a country. * * * An exception might perhaps be allowed where the alien enemy is the defendant in a suit at law in the country where he brings the bill for discovery; since it may be the only effectual means on his part to establish a perfect defense to the suit at law. And if a country will suffer an alien enemy to be sued in its courts, it is against common justice to disable him from the use of the proper means to defend himself against a dishonest or unfounded claim. * * * This dis-

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ability of an alien enemy, however, is not absolute to the extent of destroying all his future right to sue, when peace has actually taken place between the countries; for, it continues only, as the old phrase is, *donec terrae fuerint communes*; and then his right is revived. *The true effect of the disability of an alien enemy is only to suspend the commencement of any suit during the war, or, if the suit is already commenced, to suspend its further progress until the return of peace.* (See Story's Equity Pleadings, Tenth Edition, paragraphs 51, 52, 53, 54)" (See also *Speidel v. Barstow Co.*, 243 Fed., 621.)

These principles of the rights of aliens have been embodied in our state and federal decisions handed down since the beginning of hostilities between the United States and the Central Powers, April 6, 1917.

Shall the courts of the United States wholly deny a hearing to an alien enemy, not such when he sought redress, but who has since become an alien enemy?

Judge Speer, in the case of *Plettenberg et al v. Kalmon & Co.*, reported in 241 Fed., 605, May 21, 1917, answers this question as follows:

"To do this would not, in my judgment accord with the spirit of our institutions, nor with the spirit of our government, which disclaimed hostilities to the German people when it proclaimed war in defense of freedom and of a common humanity."

Judge Speer held in the above case that an action by alien enemies brought before the declaration of war should not be dismissed but merely be suspended while hostilities continue, and ordered the action continued from term to term until the declaration of peace.

Judge Grant of the Court of Appeals of Summit County, Ohio, in the case of *Nyitray v. McAlonan*, 27 O. C. A., 545, maintained the principles laid down by Justice Story regarding aliens residing within the United States by holding that—

"An alien, subject of a nation at war with the United States, domiciled in this country at the beginning of hostilities and not adhering to the enemy has the status of an alien *ami* and is not denied his day in court or the right to institute and

prosecute an action for damages resulting from the actionable fault of defendant. * * * The right of the government to despoil an alien resident when hostilities begin is not accorded to citizens thereof."

See also *Posselt et al v. D'Espard et al*, New Jersey Chancery, April 21, 1917, reported in 100 Atlantic, page 893.

Thus we have uncontrovertible authority for holding:

1. That aliens residing in the United States, at a time when a state of war exists between their government and the United States, have a right to maintain actions within the United States the same as any citizen of the United States;
2. That citizens of countries with which the United States may be at war, residing on enemy soil, and who have brought a proceeding against citizens of the United States prior to the beginning of hostilities, will not be permitted to prosecute their action, but neither will the action be dismissed by reason of the alien enemy's status of the plaintiff, but will be continued over until the conclusion of peace.

We now come to consider the status of those enemy aliens who reside in the country with which the United States is at war and who are attempting to institute proceedings in our courts against citizens of the United States since the declaration of war, to-wit, April 6, 1917, as is the case with the plaintiffs at bar.

Plaintiffs submit that under Section 23, paragraph (h) of the Hague Peace Convention of 1907, their rights to institute legal proceedings can not be abolished or suspended.

The paragraph referred to reads as follows:

"In addition to the prohibitions provided by special conventions it is especially forbidden—

"* * * * *

"(h) To declare extinguished, suspended or unenforceable in a court of law the rights and rights of action of the nationals of the adverse party."

Lord Reading, Chief Justice, interpreted this paragraph of the Convention in the case of *Porter v. Freudenberg*, reported

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in Vol. 1 Kings Bench Division, January 19, 1915, page 866, 875, adversely to the enemy alien plaintiff. The heading of that section is: "Of Hostilities." Section 3 is headed "Military Authority over the Territory of a Hostile State." Chapter 1 of Section 2 is entitled: "The means of injuring the Enemy; Sieges and Bombardments." The articles in it are numbered from 22 to 28. Articles 22 and 23 are as follows:

"ARTICLE 22.

"Belligerents have not an unlimited right as to the choice of means of injuring the enemy.

"ARTICLE 23.

"In addition to the prohibitions provided by special conventions it is particularly forbidden

"(a) To employ poison or poisoned weapons;

"(b) To kill or wound by treachery individuals belonging to the hostile nation or army;

"(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;

"(d) To declare that no quarter will be given;

"(e) To employ arms, projectiles or material calculated to cause unnecessary suffering;

"(f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy as well as of the distinctive signs of the Geneva Convention;

"(g) To destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of war;

"(h) To declare, abolish or suspend as inadmissible the right of the subjects of the hostile party to institute legal proceedings.

"A belligerent is likewise forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country, even if they were in the service of the belligerent before the commencement of the war."

The substance of Lord Reading's interpretation of paragraph (h) is that it does not abrogate the law of England, which hitherto has not given to an alien enemy the position of *personi standi in judicio*, and that paragraph (h) must be read with the governing article of the convention, as it is placed in a

group of prohibitions relating to the conduct of an army and its commander *in the field*.

"It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights."

Thus, for example, if the Commander in Chief of the American forces now occupying the valley of the Rhine were to declare that the German subjects occupying that part of Germany on the left bank of that river should not have a right to use their local courts to assert their civil rights he would be acting in contravention of the terms of paragraph (h) of Article 23 of the Hague Convention.

But even if we would not be willing to accept Lord Reading's interpretation of this paragraph of the Hague Convention, to which the United States are signatories, the claim of the alien plaintiffs in this case would fail by reason of the "Trading with the Enemy Act," passed by the Congress of the United States, October 6, 1917. Section 7 (b) of said act provides:

"Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or an ally of enemy prior to the end of the war."

The plaintiff in this case having brought this action in November, 1917, seven months after the beginning of hostilities between the United States and the country of which the plaintiffs are citizens and now residents, comes within the inhibition of Section 7, paragraph (b) of the "Trading with the Enemy Act" and he can not therefore institute or prosecute an action against citizens of the United States in courts of the United States.

The disability of an alien enemy continues only as long as the two countries are at war, and then his rights are revived. The true effect of the disability of an alien enemy is only to suspend the commencement of any suit during the war, or, if

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the suit is already commenced, to suspend its further progress until the return of peace. The controlling reason of this is, that if the alien enemy prevail and obtains judgment, it will obviously add the sum he recovers to the resources of the power of which he is subject. (241 Fed., 605.)

The defendants' motion to dismiss plaintiffs' petition should therefore be granted on the ground that this action can not be brought by a citizen and resident of a belligerent country against citizens and residents of the United States while a state of war exists between the country of plaintiffs and the country of defendants.

The question whether or not under the provisions of "The Trading with the Enemy Act" and under the subsequent executive orders, the alien property custodian may interplead and the cause proceed in his name as trustee for the enemy, is not before the court.

WIDOW'S EXEMPTION FROM LEVY AND SALE.

Common Pleas Court of Knox County.

EVA RANSOM v. MRS. CHARLES STEVENS.

Decided, December 13, 1918.

Exemption—Widow Entitled to Exemption in Personalty Regardless of Dependents—Construction of Section 11738 as now Punctuated.

Under Section 11738, General Code, "every widow" who is a resident of Ohio, and not the owner of a homestead, is entitled to hold exempt from levy and sale, personal or real property selected by her, her agent or attorney, before sale, not exceeding \$500 in value, whether she has the care, maintenance and custody of a minor child or children of a deceased relative or not.

Harry W. Koons, for plaintiff in error.

F. O. Levering, contra.

BLAIR, J.

This cause comes into this court upon a petition in error and bill of exceptions from the court of George S. Harter, a justice of the peace of Clinton township, this county.

The question presented for decision is whether the plaintiff in error, Eva Ransom, is entitled to an exemption in lieu of a homestead, under Section 11738, General Code. She is a widow, a resident of this county and state, and is not the owner of a homestead, but she has not the care, maintenance and custody of any minor child or children of a deceased relative.

A similar question has twice been before the circuit court of Hamilton county, with different results. In 1898, in the case of *Wentzel v. Hayes*, 16 C. C., 110, that court held that a widow was entitled to claim and hold such exemption, although she did not have the care, maintenance and custody of any minor child or children of a deceased relative. That decision seems to have been in accord with other Ohio decisions, and I believe was then generally accepted as the law. However, in a later case, that of *Brown v. Parham*, decided in 1903, the same court (differently constituted) held that a widow who had not the care, maintenance and custody of a minor child or children of a deceased relative, *was not entitled to such exemption*. See *Brown v. Parham*, 1 C.C.(N.S.), 602; affirmed without opinion, 71 Ohio St., 571. In this latter case, the court in construing this statute, seems to have based its conclusions upon the punctuation of the statute. As then punctuated, there was no comma after the word "widow," and the court said:

"In this section as now punctuated, the words 'having in good faith the care, maintenance and custody of any minor child or children of a deceased relative' qualify the word 'widow,' as well as the words 'unmarried female,' and a widow not having the care of such child can not hold property exempt under this section."

Within a few months after the decision in this case, the Legislature amended and re-enacted this section, punctuating it differently, and as thus re-enacted, it has been codified and carried into the General Code as Section 11738. As now punctuated, it reads as follows:

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"Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow, and every unmarried female having in good faith the care, maintenance and custody of a minor child or children of a deceased relative, resident of this state, and not the owner of a homestead, in lieu thereof, may hold exempt from levy and sale, real or personal property," etc.

It seems to me that this section as now punctuated gives the exemption to four different classes of persons: (1) "Husband and wife living together;" (2) "a widower living with an unmarried daughter or minor son;" (3) "every widow," and (4) "every unmarried female having in good faith the care, maintenance and custody of a minor child or children of a deceased relative." In its present form, it seems to me that the phrase "having in good faith the care, maintenance and custody of a minor child or children of a deceased relative," no more modifies "widow" than it does "husband and wife" or "widower," and that it would be as reasonable to say that only such "husband and wife living together" who have the care, maintenance and custody of a minor child or children of a deceased relative, are entitled to such exemption, as it would be to say that only such widow as has the care and custody of such child is entitled to such exemption.

It is my judgment that this section gives the exemption to "every widow," whether she has the care and custody of such minor or not, and that the court below erred in overruling the application of the widow for this exemption.

An entry may be placed upon the journal of this court in accordance with the above finding, reversing the judgment of the justice and sustaining the motion of plaintiff in error for the allowance of such exemption.

**UNENFORCEABLE AGREEMENT BETWEEN A BROKER
AND OWNER.**

Common Pleas Court of Franklin County.

THOMAS C. JAMISON V. RICHARD A. HARRISON, JR.

Decided, December 20, 1918.

Real Estate Agent—Should Know that One with Whom He Enters Into an Agreement to Effect a Sale—Is Able to Complete the Transaction—Purchaser Procured But Owner Not in Position to Complete the Transaction—Action to Recover Commission Not Maintainable.

An agreement between a broker and a real estate owner, for the sale of property upon terms specified, is not enforceable unless the owner is in a position to complete the transaction; and where a broker knowingly enters into a contract to procure a purchaser for one who owns an interest only, and not the whole title, a petition for recovery of his commission, after procuring a purchaser able, ready and willing to take the property upon the terms proposed, is open to demurrer.

Wilson & Rector, for plaintiff.

James A. Allen, contra.

KINKEAD, J.

This action is brought to recover \$2,115.75 on an alleged contract to procure a purchaser for a farm. The petition claims that an oral agreement was made that plaintiff was to procure a purchaser who should be ready, willing and able to buy the real estate at the rate of \$175 per acre in which defendant had an undivided one-fourth interest. Plaintiff avers that he procured the purchaser but that defendant neglected and refused to contract with the purchaser for said farm.

Defendant interposes a demurrer to the petition for want of facts sufficient to constitute a cause of action.

In support of the demurrer it is contended that as it appears from the petition that defendant only had an undivided one-

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fourth interest in the property; that as the petition failed to show that defendant had authority to make the alleged contract for all owners thereof, there is a failure to state a cause of action. That is the logical conclusion of the argument presented by counsel for defendant.

When the question was before the court on motion to require plaintiff to state the interest of defendant in the property, the thought was that when two persons make such contract under the circumstances, it must appear that the one having an interest in the property has such absolute ownership or power to make sale as will enable him to make a contract with a purchaser that will be efficacious.

The form of plaintiff's first allegation "in which the defendant had an interest," was suggestive of knowledge by plaintiff that defendant had an undivided interest in the property.

So it seemed that plaintiff's knowledge of the nature of defendant's interest and of his power, authority and ability to make a deed to a purchaser, which plaintiff might be able to procure, *might* and perhaps *ought* to have something to do with his rights under such contract.

But the learned counsel for plaintiff contends:

"What interest the defendant had in the farm is an unimportant question. If he had no interest at all, he could employ the plaintiff to find a purchaser, upon the supposable theory, for illustration, that he considered himself in a position to obtain title and make conveyance when the time should arrive. *This is the reason the court erred in sustaining the motion.* * * * Plaintiff was not bound to inquire what arrangement the defendant had for making a conveyance. That was not up to the plaintiff, and it was none of his affairs. * * * If the defendant could not convey the land, that was his own misfortune. Just a little common sense applied will be of more value than authorities on agency."

Common sense is ordinary or customary intelligence. We are unable to determine that the suggestions of counsel disclosed by the matter quoted is the usual, ordinary or customary intelligence or conception taken. So we are not at the moment

sure that it is "common sense." We are familiar with the rule that when an owner of real estate bargains with a broker to pay the latter a certain sum, if he will procure a purchaser for such land, the broker is entitled to his commission if he procures a purchaser who is ready, able and willing to take the property upon the terms specified.

But in all the cases on the subject of broker's commission with which we have "judicially" come in contact we have never had occasion to consider the right of a broker who knowingly deals with a person who owns but an undivided one-fourth, and makes an agreement to procure a purchaser with such express knowledge, but without knowing whether such part owner of the undivided interest has authority to contract for the remaining owners.

When a real estate broker makes a contract merely to "procure a purchaser" he should know that the one for whom it was made, could, when the purchaser is procured complete the transaction by making a contract and deed on the terms stated when the purchaser procured is ready, willing and able to comply with the terms. This must be so, since the rule is that a broker employed to find a purchaser is not entitled to a commission where no sale is made, *unless* a purchaser is able, ready and willing to take the property upon the terms specified by the *principal*. 19 Cyc., 246, n. 93.

Counsel for plaintiff evidently takes the position that having made a contract with an undivided one-fourth owner, having procured a purchaser who was willing to take the property upon the terms fixed by him, the broker is entitled to his commission even though the sale is not consummated because the other owners were not parties to the matter. Plaintiff's contention is that the arrangements between the owners, if there were any, did not concern plaintiff, the broker.

Suppose, for instance, that plaintiff as broker dealt with defendant, who neither had partial ownership in the property, nor authority, could it then be said that he dealt with an owner or principal, or with one having authority to represent him?

A real estate broker in undertaking to procure a purchaser in all cases must act for the principal—the owner. If he acts

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with an agent, or one supposed to be an agent, but who turns out to be an irresponsible one with no power or authority to bind the owner, in such case a purchaser procured can not be ready, willing and able to take the property upon the terms proposed by owner or principal, because there is none, so that there can be no failure on the part of an owner to consummate the transaction, which must be the basis of the broker's right to recover.

In *Wylie v. Maine Bank*, 61 N. Y., 416, it was held "that to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the *agreement of buyer and seller*, the meeting of their minds, produced by the agency of the broker."

In *Sibbald v. Iron Co.*, 83 N. Y., 378, 38 Am. Rep., 441, on p. 444 it is said:

"But in all the cases * * * the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and *seller* (or *sellers*) to an agreement for a sale. * * * until that is done his right to commissions does not accrue."

"The authorities support the rule that the purchaser must be ready, willing and able to buy on the terms specified by the 'principal' to broker. The principal of course must be an owner, not a partial owner, not an agent without full authority." See 4 Am. & Eng., p. 974, and cases cited.

If he is to procure a purchaser, he must have from the owner or owners, or through an agent with their authority, the price and terms upon which all owners are willing to make a sale. The petition on its face discloses that plaintiff did not deal with all the owners and fails to show that he dealt with any one having authority.

If a broker deals with an irresponsible person, or makes a bargain with one whom he knows has but one-fourth interest, and undertakes to get a purchaser upon terms stated by one owing merely an undivided interest, without taking the precaution of ascertaining the attitude or action of the other three owners, without knowing that the one with whom he dealt has author-

ity, or that the other three owners agree to make the contract—in such case he deals at his own peril, and assumes the risk and uncertainty.

The original petition having made it appear that plaintiff made a contract by which plaintiff agreed to procure a purchaser who should be ready, willing and able to buy at \$175 per acre real estate of which *defendant had an interest*, instead of stating “of which he was the owner” it was at once apparent that a material fact was omitted. This was the reason for sustaining the motion and this, together with failure to show defendant to be an agent with authority to act for the other owners, constitutes the basis of the decision sustaining the demurrer.

The demurrer is sustained.

PROSECUTION FOR UNLAWFUL SALE OF LIQUOR.

Common Pleas Court of Licking County.

WILLIAM A. OSBORN ET AL V. STATE OF OHIO.

Decided, 1918.

Intoxicating Liquors—Affidavit Charging Unlawful Sale of—Not Insufficient for Failure to Locate Premises.

An affidavit which charges the unlawful sale of intoxicating liquor in a county or township in this state which are named, and on and between certain dates which are named, is not open to attack on the ground that the place where the alleged sales were made is not specified.

W. E. King, for plaintiffs in error.

Russell M. Knepper, Assistant to the Attorney-General, contra.

FULTON, J. (orally).

This case is submitted to the court upon a petition in error. There is no bill of exceptions. It is insisted that the judgment

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of the mayor of the village of Hebron should be reversed because of a defect in the affidavit which was filed before the mayor charging the unlawful sale of intoxicating liquor.

The question raised by the argument is that because this affidavit does not state the particular place where it was claimed liquor was sold, contrary to the statute, it is insufficient. The claim is that the Constitution provides a defendant shall be notified in full of the charge made against him. The affidavit reads in this way:

“That from the 27th day of July, A. D. 1917, until the 2d day of August, A. D. 1917, in the township of Licking, state of Ohio, one W. A. Osborn and Edward Merchant were then and there the unlawful keepers of a place where intoxicating liquors to-wit, beer and whisky, were then and there sold, furnished and given away by the said W. A. Osborn and Edward Merchant in violation of the act of the General Assembly of the state of Ohio with reference to the sale of intoxicating liquors, to the common nuisance of the citizens and people of the state of Ohio, and contrary to Section 13195 of the General Code and against the peace and dignity of the state of Ohio.”

It is claimed that the affidavit is defective in that it is insufficient; that it does not notify Osborn and Merchant of what the state claims against them; that is, it does not notify them of the place where it is claimed that this liquor was sold contrary to law.

Now, how is that? It says: That from the 27th day of July, A. D. 1917, until the 2d day of August, A. D. 1917, in the township of Licking, state of Ohio, one W. A. Osborn and Edward Merchant were then and there the unlawful keepers of a place where intoxicating liquors, to-wit, beer and whisky, were then and there sold, furnished and given away, by the said W. A. Osborn and Edward Merchant in violation of the act of the General Assembly of the state of Ohio.

Section 13195 says: Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of law shall be fined, and so on. Then it goes on to state what shall be done in case of a second conviction, and so on. It is not claimed that there was anything done incorrectly here, or wrong-

ly, by the mayor, except that the affidavit is not sufficient to notify these men of what is charged against them by the state of Ohio, in that the place is not designated. The township where it is claimed the offense was committed is designated, and the mayor found them guilty on the evidence. I do not know what the evidence showed. There is no evidence here, but the presumption is, they were found guilty by evidence clearly disclosing that they were guilty of the charge in the affidavit; that is, that they were keeping a place in Licking county where beer and whisky were sold contrary to the act of the General Assembly. Section 13588 reads:

“An indictment need not allege the kind of liquor sold, nor describe the place where sold in violation of the following laws, namely: 1. Keeping a place where intoxicating liquors is sold in violation of law,” etc.

Now, it is claimed in the argument that that section is in violation of the Constitution; that the Constitution requires the defendant shall be notified of the nature of the crime against him. That is so. But is not this affidavit sufficient in that respect? Would it be claimed that you would have to charge on what street the offense was committed? Suppose it was in Newark, and a man was alleged to be selling contrary to law. If you stated that he was selling contrary to law in the city of Newark, wouldn't that be sufficient? The court thinks it would. I have not the testimony, and I do not know what the testimony shows, but it is not claimed the testimony itself was not sufficient to warrant a conviction, but that the affidavit upon which this conviction was had is insufficient. The court will affirm the judgment. There may be exceptions.

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TITLE TO CANAL LAND USED FOR STREET PURPOSES.

Common Pleas Court of Hamilton County.

FRANCES A. GATES V. JAMES P. ORR ET AL.

Decided, February 3, 1919.

Land Registration—Abutting Owners Seek to Perfect Title—To Land Acquired for Canal Purposes but Always Used as a Street—Title of City Held Good—Notwithstanding Uncertainty of the Record Evidence—Statute of Limitations—Adverse Possession—Common Law Dedication—Estoppel.

Where the records fail to disclose how much land was taken by the canal commissioners for the Miami & Erie canal, which was built in 1828, but it does appear that five years later the canal commissioners assented to the use by the city for street purposes of so much of the land conveyed to the state as was not in actual use for the canal, claims by abutting owners to title in the strip so used as a street down to the present time can not be maintained notwithstanding some uncertainty as to the property line as shown by old plats, deeds and maps, where the weight of the existing record evidence favors the contention of the city that the strip in question constitutes a public street, and there is undisputed evidence of its continuous use as a street, and that paving was early laid and has always been maintained by the city, and a sewer constructed and gas pipes laid, and during all the period of such use the abutting owners have refrained from encroaching upon this strip with their buildings or otherwise.

Peck, Shaffer & Williams, for plaintiff.

Charles A. Groom, City Solicitor, *Constant Southworth* and *Harry R. Weber*, Assistant City Solicitors, for city of Cincinnati.

GEOGHEGAN, J.

The proceeding herein is an application under the land registration act (103 Ohio Laws, 914, amended 104 Ohio Laws, 146), to register the title of two parcels of land described in the application as "Tract A" and "Tract B."

As to Tract A, there is no dispute.

Tract B is described in the application as follows:

“That portion of the strip of land known as North Canal street, thirteen (13) feet and one (1) inch in width measured north and south, and one hundred and four (104) feet in length, measured east and west, immediately adjacent to and next south of the aforesaid lot, and extending from the center of the said wall fence to the east line of Clay street, the same to be and remain an open-way for the use of this and adjacent premises.”

This description is intended to cover a strip of land immediately in front of the property described in Tract A, which is at the northeast corner of Canal and Clay streets, having a frontage of one hundred and four (104) feet on what is described as the open-way, known as North Canal street.

The city of Cincinnati, which is made a defendant herein, contests the right of the plaintiff to have registered in her name the parcel described as Tract B, and it was upon the issue made by the answer of the city of Cincinnati to the effect that the said Tract B constitutes and forms a portion of a public street known as Canal street or North Canal-street, and also a plea of the statute of limitations of twenty-one years, the open, notorious, continuous and adverse user of said tract as a part of a public street for upwards of fifty years, of common law dedication and estoppel, that this case was submitted to the court upon the evidence and the arguments of counsel.

The examiner appointed by the common pleas court under and by authority of the land registration act, reported favorably upon the application to register Tract B.

However, there had been no hearing before the examiner, and the city, having been made a party to the action, relies principally upon matters which do not appear upon the face of the record, although insisting that the record itself discloses that the tract in question is a part of the public street.

The difficulty in this cases arises, in so far as the court can discern after an inspection of the record, the hearing of the evidence and an examination of the great number of exhibits offered in the case, from the fact that the records do not disclose how much land was taken for the purposes of the Miami &

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Erie canal by the commissioners appointed for that purpose in the early part of the last century.

The canal was built in 1828. At that time, Stephenson and wife, predecessors in title of the plaintiff, were the owners in fee simple of Lot No. 3 of McFarland's subdivision, part of the south thirteen feet of which are in question. In 1833, the canal commissioners assented to the use by the city for street purposes of such ground conveyed to the state as was not in actual use for the canal. Therefore, the first question that necessarily presents itself is—How much did the canal commissioners take for the purposes of the canal?

The evidence is plain that from the bend of the canal at Plum street, eastwardly to Clay street, the canal was one hundred and fifty feet wide, that is, there were seventy-five feet of land taken north and south of the center line of the canal, which the old plats indicate was approximately the center of Eleventh street. There is a deed offered in evidence from a certain Torrence to the state of Ohio, under date of April 11, 1826, which purports to establish a seventy-five feet line from the center of the canal for the property west of Main street. There is considerable doubt whether this deed conveyed any title or color of title, but, taken in connection with the fact that this same line described as seventy-five feet north of the center of Eleventh street has been recognized by disinterested persons from the date of the construction of the canal down to the present time, it may be said to be some evidence of the fact that the canal was one hundred and fifty feet wide west of Main street and east of that public street which was subsequently called Clay street.

Recitals in ancient deeds, documents and maps are competent evidence to prove the location of a disputed line, whether the line attempted to be proved is the one immediately in dispute between the parties or the one from the position of which the location of the immediately disputed line can be determined. *Whitman v. Shaw*, 166 Mass., 451; *Hathaway v. Evans*, 113 Mass., 264.

An examination of the deeds offered in evidence would indicate that various persons who owned real estate in this vicinity

conveyed their real estate by such descriptions as would indicate that the seventy-five feet line was the correct northern boundary of the property taken by the canal commissioners, that part of which not occupied by the canal proper being known as Canal street or North Canal street, and William Stephenson, himself, who was the ancestor of the plaintiff herein, accepted a deed from Nicholas Longworth which fixes the north line of North Canal street as this seventy-five feet line.

Counsel for the plaintiff insist that the description in the deeds referred to is erroneous, and it was omitted from the description in a subsequent deed from one Green, when he conveyed the Main street end of the lot to Stephenson in November, 1830.

While it is true that this so-called erroneous language was omitted, nevertheless, when Stephenson conveyed to Riddell he specified that his grantee "will never use or occupy the premises aforesaid for any other purpose or use than as a public street." It is evident from this that Stephenson must have himself recognized that there was some doubt as to where his line was, and it is further evident that at the time of the conveyance the property must have been in some use by the public as a street, for, otherwise, it would not have been necessary for Stephenson to have made this restriction in his conveyance.

It would only encumber this decision to make further comment upon the great number of deeds that have been offered in evidence. There are a great many of them which can be reconciled with the fact that the north line of Canal street was seventy-five feet north of the center line of the canal. Even deeds accepted by the immediate ancestors of the plaintiff contain descriptions which would indicate that line, notably the deed from Longworth, of the Clay street end, to Stephenson, in June, 1830, and the Main street end to Green in 1829, which described the property in such a way as to indicate the line of North Canal street to be where the city claims it is at this time.

While it is true that when Green conveyed to Stephenson, the alleged erroneous language was omitted from the description, and subsequent deeds from Stephenson to Riddell and Riddell to the City of Cincinnati did not conform to the original

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description, nevertheless, it remains that the original deeds fixed a line which would seem more nearly in consonance with the line as claimed by the city to have been established by the canal commissioners and which conforms to the line of the canal for a number of blocks west of the property in question.

Besides this, we have in evidence a plat taken from Grade Book No. 1 of the engineer's office, made in 1840, which shows the width of North Canal street to be forty-eight feet wide both east and west to Clay street. This forty-eight feet, plus twenty-seven feet, being half the width of the canal proper, would fix the north line of North Canal street at seventy-five feet north of the center of the canal. There is also an unsigned plat in the same grade book which purports to be a plat of Main street, which shows the width of North Canal street as forty-eight feet on the west side of Main street and thirty-eight feet on the east side. While this plat is not dated, its position in the grade book would indicate that it was made some time prior to 1840. These plats have been constantly in use in the city engineer's office and were made at a time when the ordinances of the city of Cincinnati required the city surveyor to make an actual survey at the time the grade was established. The platting commission plat shows the width of North Canal street, at Main street, to be forty-eight feet.

It would seem from this evidence, both of deeds and plats, that the width of North Canal street was forty-eight feet and that the distance from the center line of the canal to the north line of North Canal street was seventy-five feet. If this be true, then the registrant would not be entitled to register the strip of thirteen feet described in the application as Tract B.

It will not do to say that from 1831 to 1860 there is no evidence of the width of North Canal street. When the various deeds offered in evidence, as well as the plats and maps, are taken into consideration, it would seem that the canal commissioners appropriated one hundred and fifty feet for the canal, and the excess amount not needed by them in their work became the property of the city of Cincinnati for public streets. And while we are not unmindful of the deeds and maps upon which counsel for petitioner relies, if this case were to be determined en-

tirely upon the evidence afforded by deeds and maps, we would be compelled to say, in the light of all the surrounding circumstances, that the evidence as to forty-eight feet being the width of North Canal street controls, rather than that as evidenced by the deeds from Stephenson to Riddell and Riddell to the city of Cincinnati, and others to the same effect offered by plaintiff.

However, we do not have to depend entirely upon the evidence afforded by these deeds and maps. A number of witnesses who lived in the neighborhood and whose memory goes back for a great number of years, some of them long prior to 1860, testified that the way used as North Canal street was substantially the same width then as it is today and testified that the line of buildings from Main street to Walnut street were all in one straight line, and some of whom testified that the present Stephenson building is built farther south than the building which preceded it. Henry W. Stephenson, himself an heir of the William Stephenson who owned the property at the time the canal was built, testified that there never was any building on the thirteen foot strip in question. And all those witnesses testified that the property was in constant use by the public as a street for the purpose of passing from Main to Walnut streets, or in turning into an areaway which led to a wagon-yard of a hotel which fronted on Main street some distance north of the canal.

In 1877, the Gas Company laid a pipe on the strip in controversy. There is an entry in Stephenson's journal or family docket to that effect, which recites that "this pipe was laid on our property," but the journal does show, at least argumentatively, that this pipe was not laid under any building but was laid under the open-way, and Michael Connelly, who worked for the gas company at that time, testified that when the pipe was laid it was laid along what apparently was the street and not under or through any building.

There is no evidence at all in the case that there was ever any building upon this thirteen feet strip, with the single exception of a plat which was prepared by Thomas Punshon, which indicates the presence of frame buildings on the thirteen feet strip.

It is difficult to reconcile this finding of Punshon's with the evidence of the neighborhood witnesses, and especially with the

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entries in the docket kept by Arthur Stephenson, which speak of building a certain frame shanty and then pushing it out on the thirteen feet strip. It seems that Stephenson was arrested by the police for attempting to build this shanty out beyond the house-line and was advised by his counsel to put it back of the house-line and then to push it forward after it was built. At least, this is the testimony of Henry W. Stephenson.

There may be a possible reconciliation in this—that when Punshon made his plat, the Model Laundry building, which occupies Tract A herein, was about to be constructed, and these buildings were either moved out while this construction was in progress, or were pushed out in the street in pursuance of a plan of Arthur Stephenson to throw some cloud upon the city's title to the strip in question.

During all this period of years, the plaintiff's predecessors in title paid taxes on that portion embraced in Tract A and not upon any portion embraced in Tract B, which is in dispute herein.

Immediately after Punshon was there the buildings were evidently removed because the evidence discloses that after the erection of the Stephenson building and the Model Laundry building, North Canal street remained in substantially the same condition as it is today.

It does not seem that until this suit was brought any steps were ever taken by William Stephenson or his successors in title to establish any title in themselves south of the seventy-five feet line. While counsel for the plaintiff insist that this way was kept open for the convenience of the abutting owners, there is no substantial evidence to justify that assertion. The only evidence of any assertion of title is that involved in the arrest of Arthur Stephenson for the obstruction of the street, and while it is true that he was dismissed in the police court, this cannot be said to be a finding of title in the abutters to that portion of the street. Certainly it can not be claimed that a criminal action, resulting in the dismissal of the defendant in the police court, would establish a title to land. The very fact that counsel for the plaintiff, in his argument, insists that there was a private way there,

impliedly recognizes the fact that the property was used at all times for street purposes and not occupied by any building.

It therefore seems to me that the acceptance by William Stephenson of the deed from Longworth, conveying the tract referred to by measurement to the seventy-five feet line, which measurement he could not overlook because it described also the width of his lot that was left, namely, about forty-two feet, the building of the Stephenson and Model Laundry buildings along the said line, the payment of taxes on all but the thirteen feet strip in controversy, the platting of the street as forty-eight feet wide, the advertisement for claimants made in 1844, the continuous use as a public street, the improvement of the street with cobblestones, the building of the sewer, and other evidence offered in the case to which it is not necessary to refer here, all show a clear intent to dedicate and an acceptance of that dedication. It would be more than passing strange to have a private way thirteen and a half feet wide along a public way some twenty-five feet wide. It would certainly seem that owners of property, who construct valuable improvements, would take in the construction of these improvements all the ground that was rightfully theirs. It would seem somewhat beyond the bounds of reason that an owner, whose property abutted upon a public street admittedly at least twenty-five feet wide, which by the terms of its grant could only be used for public street purposes, would immediately alongside thereto create a private way some thirteen and a half feet wide. It would be more in conformity with the common course of conduct that owners who construct valuable improvements upon streets would, if they desired to have a greater width of street in front of them, dedicate a portion of their property to make the additional width of the street. And that would seem to me to be the common sense view to take of the conflicting circumstances as shown by the evidence herein.

It is evident to me that William Stephenson, if he claimed any title at all originally, after the canal commissioners made their appropriation of the strip in question, intended to dedicate that strip to the city of Cincinnati, and in pursuance of that

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intention carefully refrained from building the large Stephenson building upon any line south of the seventy-five feet line from the center of the canal. It will not do to say that he intended to maintain a way for access to his property in the rear because there was already amply sufficient access to that property over that portion of North Canal street about which there is no dispute. And the fact that the city made plats which show a conformity with this idea, that they advertised for claimants, that they made certain improvements, and that the public generally used the property, not for the purpose of doing business with the owners of the abutting property, but for general public street purposes, indicates an acceptance of this dedication on the part of the public.

For upwards of eighty-five years, the owners of the abutting property have taken no steps to establish their claim. If they had any right to this property, it certainly would seem that they would have taken some steps ere this to have that right determined, but their whole course of conduct, even in so far as they were concerned, has been that of a doubt regarding their title. Even in the deed by which the plaintiff herein acquires title from the Stearns Realty Company, which grant occurred a short time before the bringing of this action, the property sought to be registered herein is described in two tracts, the tract herein described as "A" being conveyed by deed of general warranty, and the tract herein described as "B" being quit-claimed only, and the deed further recites:

"The Stearns Realty Company, for itself and for its heirs, executors and administrators, does hereby covenant as to the premises first described (but not as to the premises second above described), with the said Frances A. Gates, her heirs and assigns, that it is the true and lawful owner," etc.

I have given this case careful consideration, I have made a thorough examination of all the authorities submitted, and have gone carefully through the numerous exhibits that have been offered herein. I realize the importance of this matter, both from the standpoint of the public and that of the owner of the

property. I have been especially careful because of the report of the examiner recommending the registration as prayed for in the petition, and I must concede that I have a great respect for his opinion. But, the matter has been presented to me in a different light than it was to him. I have had all the evidence before me, where he has had only such evidence as the records afford. I must admit that there are some complications and discrepancies in the evidence which seem to cast the shadow of doubt upon the whole matter, but, on the whole, I believe that the conclusion I have come to is the correct one.

I have made an examination of the act under which this proceeding is brought, and am not sure that I can enter a decree adjudging the title to the strip in question to be in the city of Cincinnati; so, I will content myself at this time by simply deciding that the application to register that portion known as Tract B be refused. Counsel may then take up with me the question of the nature of the decree that should be entered in this case.

**VALIDITY OF A MORTGAGE COVERING AUTOMOBILE
OF AN INSOLVENT.**

Common Pleas Court of Franklin County.

DAVID E. EVANS, TRUSTEE, v. HOTEL GARAGE CO. AND
CAREY SHORT.

Decided, December 21, 1918.

Bankruptcy—Trustee Can Not Recover by Replevin in a State Court—Property of the Bankrupt Held Under a Chattel Mortgage, When—Elements which Must be Shown to Render a Mortgage Invalid—Four Months Period Runs from Adjudication—Jurisdiction Where Property Claimed to Belong to a Bankrupt is Involved.

1. An action in replevin does not lie for recovery of property belonging to a bankrupt but held by a creditor under a chattel mortgage, where there are no facts averred by the trustee going to show that the mortgage was intended as a preference, or which afford reasonable ground for belief on the part of the mortgagee that he was to receive a greater percentage on his claim than other creditors,

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and the execution of the mortgage occurred more than four months prior to the adjudication in bankruptcy but the recording of the mortgage was within the four months period.

2. Jurisdiction in such a case is in the federal and not in the municipal or state courts.

F. M. McCartney, for plaintiff.

C. S. Druggan, contra.

KINKEAD, J.

Plaintiff as trustee in bankruptcy of Edward J. Gould brought action in replevin in municipal court to recover an automobile from defendant Short who claims possession under a chattel mortgage.

1. On November 1, 1917, Gould executed the mortgage to Short.

2. On August 7, 1918, the mortgage was filed for record.

3. On September 25, 1918, Gould filed his petition in bankruptcy.

4. On October 5, 1918, Short took possession of the car and placed it in the possession of the Hotel Garage Company.

5. On the 7th of October, 1918, Gould was adjudged a bankrupt.

The petition merely alleges appointment of plaintiff as trustee, and as such owns and is entitled to possession of the machine, praying for judgment of recovery.

The answer and cross-petition sets up fully the facts concerning the note and mortgage.

The reply alleges the filing of the bankruptcy on September 25, 1918, "less than four months after filing and registration of said chattel mortgage with the recorder of Franklin county," and that the automobile was turned over to the mortgagee October 7, 1918.

Who is entitled to the automobile?

The mortgage which the bankruptcy condemns and renders voidable is one which constitutes either a *preference* or one which is invalid under state law, or one made to defraud creditors.

A mortgage, otherwise valid, may be avoided as a lien because it constitutes a preference in bankruptcy. Such mortgages are

rendered invalid under the bankrupt law simply because the statute makes them voidable. They are valid between the mortgagee and the bankrupt. The mortgage may be declared voidable if given by an insolvent person, when the effect is to give a greater percentage to one creditor than another, and the creditor receiving the mortgage had reasonable cause to believe that it was intended to give a preference. Lastly, it must have been made within four months before filing the petition in bankruptcy or after filing the petition and before the adjudication.

If any element of the combination is wanting, the mortgage being valid under the state law, there is no infringement of the bankrupt law. *Loveland on Bankruptcy*, Section 197b.

Under Section 9587, U. S. Compiled Statutes, the giving of a mortgage by a person as a preference, while he is insolvent and with intent to prefer, is an act of bankruptcy and gives creditors a right within four months after the commission of such act or acts of bankruptcy to file a petition against the debtor.

The four months' time specified by statute within which a mortgage may be declared voidable as a preference does not expire until within four months after the date of the recording or registering of the transfer, when the act consists in having made a transfer with intent to *hinder or delay* creditors, or *for the purpose of giving a preference*. Section 9587.

When the mortgage is valid by state law, in the state court in such proceeding no legal presumption of intent to prefer can be indulged in.

The petition merely avers that plaintiff is trustee in bankruptcy for Gould, bankrupt, and as such is entitled to the automobile. In response to defendant's claim of mortgage, the plaintiff alleges that Gould filed his petition in bankruptcy on the 25th of September, 1918, less than four months after the filing or the registration of the chattel mortgage.

It is not alleged that Gould transferred his property with intent to hinder, delay or defraud his creditors, nor that he transferred the automobile with intent to prefer such creditor over others.

But the fact that Gould filed petition in bankruptcy is sufficient to show that he had creditors. The fact that he gave a chattel

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mortgage standing alone without other facts is not sufficient to disclose an intent to give preference within the purview of the bankrupt law. "Less than four months after the filing and registration of said chattel mortgage," etc., as found in the reply of plaintiff is a mere legal conclusion, and not the statement of any fact, and can not be so regarded.

The cross-petition of Short, however, supplies the *fact* of date of registration as August 7, 1918. Nowhere in the pleadings of the parties is the date of the adjudication stated. It is found in defendant's brief, but not in the pleadings. It does not appear in the reply of plaintiff. Plaintiff fails to aver facts showing the mortgage to have been intended to be a preference. He fails to show facts that disclose a reasonable cause on the part of Short to believe he was to obtain a greater per cent. than any other creditor. *Loveland on Bankruptcy*, Section 194c.

Though the giving of a chattel mortgage, or the placing of same on record within four months from the filing of the petition, may be considered an act of bankruptcy and furnish ground for filing an involuntary bankrupt petition, and lay the foundation for the bankruptcy court to declare it void, still the fact is to be taken into consideration in a state court that the lien which the trustee in bankruptcy has does not arise until *adjudication in bankruptcy*. The lien which the trustee has is considered as holding, must be a lien attaching as of that date. There can be no ground for saying that the lien is in existence before the bankruptcy. *Big Four Implement Co. v. Wright*, 207 Fed., 535; *Remington on Bankruptcy*, p. 1124.

This court can not say that this mortgage as a lien in the Gould bankruptcy was intended to be a preference and that Short knew it, or had reasonable grounds for believing it to be so.

In *Dougherty v. Bank*, 28 A. B. Rep., 263, it is held by Sater, J., that:

"The validity of a chattel mortgage * * * given by a bankrupt to a bank as security, must be determined as of the date of its execution; and where it was given in good faith and valid when executed, and *neither preferential or fraudulent*, under state law, because withheld from record, the fact that it was not filed within four months of the bankruptcy proceedings does

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not make it invalid under Section 60a of the bankruptcy act as amended in 1903." See also *In re S. D. F. & Mfg. Co.*, 208 Fed., 813; *In re Anderson*, 41 A. B. Rep., 731.

A trustee in bankruptcy acquires only a general lien by his appointment. He becomes vested with all rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, as to property in the custody of the court. The law simply places the trustee in the position of a creditor who has reduced his claim to judgment, whose rights with respect to specific property are subject to all latent or secret liens or equities in favor of third persons. U. S. Comp. St., Supp. 1911, p. 1500; *In re S. P. Forge & Mfg. Co.*, 208 Fed., 813.

Furthermore plaintiff has not pursued the proper remedy. The parties could and should have invoked the jurisdiction over this matter in the federal court. It can not be determined in replevin in the municipal court, then on appeal to this court.

The demurrer to the cross-petition is overruled; and searching the record it is sustained as to plaintiff's petition and reply.

Plaintiff's action is ordered dismissed.

TIME LIMITATION FOR BRINGING SUIT ON AN INSURANCE POLICY.

Common Pleas Court of Licking County.

CLARENCE STRADLEY, GUARDIAN, ETC., v. THE HARTFORD FIRE
INSURANCE Co.

Decided, January Term, 1918.

Fire Insurance—Validity of Time Limitation for Bringing Suit—Inexcusable Delay in Filing Action for an Imbecile.

1. A provision in a policy of fire insurance, limiting the time for bringing suit to one year after the fire, is binding on the insured.
2. Where the property destroyed was owned by an imbecile, and a guardian was appointed immediately after the fire who filed proof of loss but upon rejection of the claim did nothing further until a year from the date of his appointment when suit was filed,

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the incapacity of the owner of the property does not prevent the time limitation from taking effect and the petition will be dismissed.

Phil. B. Smythe, for plaintiff.

Kibler & Kibler, J. W. Mooney and R. M. Edmond, contra.

FULTON, J. (orally.)

This is an action brought upon a fire insurance policy, and the policy, or a copy of it, is attached to the petition. There is only one question raised, and that is as to whether or not this action was brought within time. The facts are as follows:

The fire occurred on the 17th day of March, 1914. Clarence Stradley was appointed guardian April 8, 1914—guardian of this old lady. The first proof of loss was made by him, as guardian, on the 11th day of April, 1914. A verified proof of loss, sworn to by him, was delivered to the company on April 17, 1914. It was rejected on April 22, 1914. He was notified that they would not pay the loss. Sarah C. Stradley died October 8, 1915. Those are the facts in the case. The insurance policy has this clause in it:

“No suit or action on this policy for the recovery of any claim will be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire.”

All of the courts, as far as I have been able to find out, hold that such a clause in a policy is good. It is a contract made between the parties—the plaintiff and the defendant—and every case that I have examined holds that it is good; and there are a number of them in the briefs. This fire occurred on the 17th day of March, 1914, and the petition was not filed in this case until the 8th day of April, 1915—the original petition.

Now, the question is as to whether or not that petition was filed within time, and that is the only question in this case that is submitted to the court.

It is claimed by the plaintiff that because Sarah C. Stradley, at the time of the fire, was an imbecile, or a person of unsound mind, that the statute did not begin to run. That is the claim of the plaintiff, but we find that immediately after the fire she had a guardian appointed for herself, or someone was appointed guardian; I do not know that she had it done, but, Clarence Stradley was appointed guardian on April 8, 1914. The court can not understand why this guardian should have been appointed immediately after the fire, except for the purpose of taking care of her interest in this insurance policy. He proceeded from that time right along to get this matter in a condition which would require the company to pay the loss. I do not care who it was, or how capable they were to do business, they could not have done it any faster than it was done in this case. He was appointed guardian on April 8, 1914, and he took control of her business from that time on, and he proceeded immediately to notify the company of the loss. After that he prepared and made a proof of loss as required by the company and by the policy, and on the 22d of April, 1914, they notified him that they would not pay it. No action was begun upon the policy until the 8th of April, 1915. The only question is as to whether or not that is within a year after the fire, as required by this clause in the policy. The only excuse that is offered or given, or any reason that is offered for not beginning suit sooner is that she was an imbecile at the time; but under all the circumstances there is no excuse for suit not having been brought before, because the claim was rejected on the 22d of April, 1914, and from that time nothing was done at all about this policy until the 8th of April, 1915. This court holds that the clause is good, and that this action was not begun in time. The petition may be dismissed, and there may be exceptions.

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**MUNICIPAL CONTRACT WITH UTILITY NOT IMMUNE
FROM LEGISLATION.**

Common Pleas Court of Cuyahoga County.

**CITY OF LAKEWOOD V. THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY.**

Decided, October 23, 1918.

Construction of the Public Utilities Act—Its Controlling Effect Upon Stipulations Contained in a Franchise Ordinance—Agreement Between a Utility and Municipality may be Contractual in Form—But is not Immune from Legislation—Change may be Made by the Legislature by Prescribing a Different Method of Procedure by the Utility—Without Impairment in the Constitutional Sense of an Existing Contract with the Municipality.

1. Where acting under Section 3618 a municipality erects, maintains and operates an electric plant for the purpose of furnishing its inhabitants with light, heat and power, no rights are acquired by inhabitants by reason of contracts entered into by them with the municipality for such purpose nor can such contracts be enforced. The plant in such a case, with all of its appurtenances, is subject to sale and transfer, and where a valuable consideration has been agreed upon and the purchaser has entered into possession with the acquiescence and by virtue of the affirmative acts of the municipality, a valid sale has been made.
2. Where a municipality, by acquiescence and affirmative acts, permitted the purchaser of such lighting plant and appurtenances to use and occupy its streets and public places with its equipment, and where it and its inhabitants received light, heat and power uninterruptedly and without objection for nearly twelve years, the consent of the municipality, provided by law for such occupancy, will be presumed, and the parties will be estopped from denying such consent.
3. An ordinance granting to such purchaser the consent of the municipality for the occupancy of its streets, alleys, etc., and also authorizing the sale of the electric plant, contains two subjects, and is void; and its provisions regulating charges for service, extensions and additions are not binding on either of the parties.
4. Contracts which inure to the benefit of the inhabitants of a municipality by virtue of a franchise granted to a public utility corporation, and which grow out of and form an element of its franchise, are subject to and are superseded by the Public Utilities Act, un-

less the power to grant such franchises and such rights is conferred by valid constitutional statutes in express, clear and unmistakable terms.

R. G. Curren, Director of Law, for plaintiff.

Tolles, Hogsett, Ginn & Morley and *Frank M. Cobb*, contra.

FORAN, J.

This is an action for final, mandatory and preventative injunction, the prayer of the petition asking that the defendant be required to perform certain positive acts and be enjoined from performing certain other acts. It was tried upon the pleadings and a stipulation as to such facts as were competent, relevant and material.

Briefly stated, the facts are that the plaintiff is a city and duly organized municipal corporation, located in Cuyahoga county, and is the successor of the village of Lakewood, a duly organized municipal corporation, existing as such before Lakewood became a city. The village of Lakewood, some years prior to March 18, 1907, erected and installed at public expense a municipal electric lighting plant or system for public and private lighting within its corporate limits, which lighting plant, with all its appurtenances, the village of Lakewood, on or about March 18, 1907, sold and transferred to the defendant, the Cleveland Electric Illuminating Company, for the sum of \$76,600. The defendant is an Ohio corporation, organized under Section 3471a Revised Statutes, being an act supplementary to Sections 3454 to 3471, inclusive, Revised Statutes, passed by the General Assembly January 26, 1887 (84 O. L., 7). The sale was consummated by an ordinance of the village of Lakewood adopted and in full force, so far as the village was authorized to pass said ordinance, March 18, 1907. This ordinance contains certain conditions and stipulations which were formally accepted by the defendant company. By the terms of the ordinance, the defendant is granted the right to erect, maintain and use all the necessary appliances essential to transmit electricity through the streets and alleys of the village, for the purpose of furnishing the public and private persons light, heat and power. Among the conditions essential to a continuance of the rights and priv-

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ileges granted are the provisions of Section 6, which read as follows:

"Section 6. The said the Cleveland Electric Illuminating Company, its successors and assigns, shall extend their wires overhead, on any street, lane, alley or highway, and furnish light therefrom whenever contracts with private consumers can be secured at the rate of one for each three hundred (300) feet of overhead extension desired, and such extension shall be made without cost or expense to such consumers."

The plaintiff, as successor of the village, avers in its petition and reply that the defendant accepted the terms of the ordinance and for a number of years exercised and enjoyed all the rights and privileges therein granted, but for many months past has refused to comply with the terms and conditions of Section 6 thereof, unless the applicant for extensions and current within the 300 feet limit prescribed shall deposit with the defendant a specified amount, with the stipulation or agreement that only a part of the amount so deposited shall subsequently be refunded, and that said defendant, in violation of its contract with it, as successor of the village of Lakewood, as evidenced by the said ordinance and especially Section 6 thereof, refuses to make the extensions therein provided for, unless the applicant or consumer shall advance the necessary cost and ultimately pay a portion thereof.

The defendant interposes three defenses:

First, that the provisions of Section 6 of said ordinance "were wholly unauthorized and *ultra vires* of the powers of said village and are null and void and are not binding or obligatory upon either the village or upon the defendant."

Second, that the provisions of Section 6 of the said ordinance are repugnant to and inconsistent with certain sections of what is popularly known as the public utilities act, passed by the General Assembly May 31, 1911 (102 O. L., 549), and because of the failure to comply with the provisions of Section 53 of said act, now known as Section 614-51, General Code, and exercise the remedy therein prescribed, it is not entitled to the relief demanded.

For its *third* defense, defendant says it, on October 27, 1917, and on other dates thereafter, issued and filed with the public utilities commission its rules and regulations providing for and affecting additions and extensions and charges therefor to consumers for commercial loads of 5 K. W. capacity and less, and such loads in excess of 5 K. W. capacity, which rules and regulations were issued and filed in compliance with the provisions of said public utilities act; that by special permission of the Public Utilities Commission, these rules and regulations became effective as of the date such permission was given by said Public Utilities Commission and are, at this time, the only lawful and effective rules and regulations governing the defendant in making additions and extensions and prescribing charges therefor. These rules and regulations require all applicants for extensions and additions to deposit with the defendant the entire estimated cost of the same, with the understanding that the estimated normal cost of the extensions and additions, as of July 1, 1914, will be refunded to the applicant in accordance with certain specified conditions. These requirements, it is claimed by the defendant, are made imperatively necessary to the practical operation of its business by present war conditions, creating a large demand upon it for electric power by persons engaged in manufacturing and furnishing the United States Government with all kinds of war products and material, which demands it claims have so taxed its generating and distributing system as to require large additional capital, which can not be secured without the consent—which consent can not be had—of the Public Utilities Commission and the capital issues committee, created by act of Congress approved April 5, 1918.

The evidence does not clearly support the contention of the defendant as to this third defense, except as bearing upon the well known and understood economical and historical fact that while peace relaxes, war tends to develop the strength of governmental function and of necessity actually does increase and broaden the sphere, scope and powers of governmental organization. It is quite obvious that when a nation is prosecuting a great war for the preservation of its institutions and its honor and integrity, and upon the ground that the liberty of mankind,

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and the civilization of the world are menaced, every atom of its resources, political life and energy must be conserved, and no part of its constitutional or inherent powers can in the slightest manner be abated, modified or relaxed. The court has no illusions as to the motives which prompt the defendant in invoking the public utilities act and the police power of the state to aid it in escaping contractual obligations which have become burdensome and onerous by reason of war conditions. No one will seriously contend that these motives are public spirited, wholly disinterested or altruistic, but as legal exegesis is not governed by motive, a consideration of that phase of the controversy would be unprofitable, if not gratuitous.

It must be admitted that when the defendant entered into negotiations with the village of Lakewood, it was casting an anchor to westward or seeking to protect its western flank from the possible aggression of competitive forces. The prowess of the defendant as a visored knight in jousts of competition is well known and in this respect its shield and its lance remain unbroken, but as the issues before the court involve problems in hermeneutics, rather than questions of morals or ethics, a consideration of that phase of the subject is necessarily foreclosed. [In this connection, however, it may be said that when a public service corporation is subjected, as it often is, to the exigencies of party politics, its right to defend itself and the interests of its stockholders committed to its keeping will not be denied; nor will the methods or measures adopted, under such circumstances, to present to the public the other side of the shield be too closely scrutinized.]

At the very threshold of our inquiry looms the pregnant, judicially decided fact and conclusion that when the village of Lakewood, some year prior to 1907, appropriated and employed public funds, raised by taxation of its citizens, to erect and install a municipal lighting plant to furnish light, heat or power to its inhabitants, its act in so doing was not within the scope of its powers and was clearly *ultra vires*. It will, of course, be conceded that a municipal corporation is a mere department of government or political sub-division of the state, made necessary by the need of relieving the central authority of the state

of the routine and details of local government, and that such corporation has no power even in municipal affairs, except those expressly granted by the state or which may be fairly inferred from the language, scope, purpose and object of the grant, or which may be said the state, by clear intendment, intended to grant.

In erecting and installing its municipal lighting system, the village of Lakewood evidently acted upon the belief that the authority to do so was conferred by sub-division 15 of Section 1536-100, Revised Statutes, which section at the time contained the enumeration of powers granted to municipal corporations by the Legislature. Among other things, it is provided by Sub-division 15 of this section that municipal corporations shall have power, when properly exercised by its council by ordinance:

“to establish and maintain municipal lighting, power and heating plants and to establish, maintain and operate natural gas plants and to furnish the municipality and the inhabitants thereof with natural gas for heating, lighting and power purposes, and to acquire by purchase, lease or otherwise, all necessary lands for such purposes, within and without the municipality.”

Even a cursory reading of this act clearly shows that while a municipal corporation might appropriate public moneys to build and install an electric plant to light its streets and public buildings, it was wholly without power to erect and install and maintain such plant or system for the purpose of furnishing light, heat or power to its citizens, as the intention of the Legislature is clearly gathered from the provision relating to natural gas plants, where it is provided that the municipal corporation may establish, maintain and operate natural gas plants and furnish the municipality and the inhabitants thereof with natural gas for heating, lighting and power purposes, but no such provision is found in the statute empowering a municipality to furnish electric light, heat or power to its inhabitants or citizens, and it was so held by the Supreme Court in *Jackson, a tax-payer, etc., v. City of Nelsonville et al*, decided February 4, 1908 (77 O. S., 637), where the judgment of the Circuit Court of Athens County was reversed.

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“because at the time of entering upon the enlargement of the electric plant, the statute contained no authority for furnishing electricity to citizens.”

At the time of this decision, the Legislature was in session and within a month thereafter the act now known as Section 3618, General Code, was passed (99 O. L., 34, Section 70). This section gives to municipal corporations the power to establish, maintain and operate municipal lighting, power and heating plants and to furnish the municipality and the inhabitants thereof with light, power and heat.

This may be important only as showing that at the time the village of Lakewood passed the ordinance in question it was dealing with property it had no right to acquire for all the purposes for which it acquired it and used it. One of the really important and vital questions in the case is the maintenance of the proposition that any legislation, whether state or municipal, which discriminates as between citizens or classes is subversive of the public safety and the public welfare, and if this proposition is sound, it necessarily follows that the reservation by the state of the authority and power to regulate public service corporations is vitally important. Why should a citizen of the village of Lakewood, whose dwelling was equipped for and lighted with gas, be taxed to supply electric light to his more ambitious neighbor? Manifestly, the village had no authority to so tax a citizen without his consent, unless the power to do so, granted by the state, was unmistakably clear. No such power having been granted to the village of Lakewood, any citizen of that village might have enjoined the operation of this municipal lighting plant at his pleasure. The village having, however, received the purchase price, and the defendant having taken and appropriated the equipment, both would be estopped from electing to rescind the contract so far as the purchase of and payment for the plant was or is concerned, as neither of the parties can be now placed in *statu quo*.

It must be remembered, however, that the ordinance, in so far as it provided for effecting the sale of the village plant to the defendant, related to property the village had no legal right to

acquire, maintain or operate, except in its proprietary capacity, and if we treat the parties as being estopped from rescinding the contract so far as the sale is concerned, and treating the ordinance merely as a grant or franchise or consent to the defendant, it will be seen at a glance that there were two separate and distinct propositions involved in the transaction. The provisions of the ordinance relating to the sale are found in Section 8 of the ordinance. This section provides in effect that the validity of the ordinance or grant and its continuance is made conditional upon the payment by the defendant to the board of trustees of public affairs of the village of \$76,600, in accordance with the defendant's offer and bid for the village lighting plant, and the acceptance of the same by the trustees and the due execution of the sale and transfer of the property.

The title of the ordinance is:

"An ordinance granting to the Cleveland Electric Illuminating Company, its successors and assigns, the right to erect, construct and maintain and use the necessary poles, wires, conduits and such other fixtures and appliances, overhead and underground as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys, and ways of the village of Lakewood, for the purpose of furnishing said village, the general public and private persons, light, heat and power by electric currents."

It will be seen that Section 8 has no connection whatever with this title and is wholly repugnant to it and is wholly foreign to the purposes expressed in the title.

If there was a contract, as appears, between the board of trustees of public affairs of the village and the defendant, for the sale of the village plant and the defendant had paid, or was ready and willing to pay, the price agreed upon, an ordinance effecting the sale was really not necessary, as it might have been done by resolution or motion. *Kerlin Bros. Co. v. City of Toledo*, 20 O.C.C., 603.

Section 4226, General Code, prescribing the mode and manner of passing of ordinances by municipalities, provides that

"No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title."

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The provision of this section, that no ordinance shall contain more than one subject, is mandatory (*Bloom v. Xenia*, 32 O. S., 461; *Campbell v. Cincinnati*, 49 O. S., 463); in which cases it was, in substance, held that where two ordinances are required, a separate vote on each is necessary. This doctrine is approved in *Heffner v. City of Toledo*, 75 O. S., 413. The court says in the syllabus that the requirement that no ordinance shall contain more than one subject

“was intended to prevent the uniting in one ordinance of diverse subjects or measures and affecting its passage by uniting in its support all those in favor of any, and to prevent the adoption of ordinances by the votes of councilmen ignorant of their contents.”

The provision “which shall be clearly expressed in its title” is held directory in *Pim v. Nicholson*, 6 O. S., 176. These provisions of Section 4226, General Code, were evidently suggested by Section 16, Article II of the Constitution; the language, except that “ordinance” is substituted for “bill,” is identical.

In *People v. Mahaney*, 13 Mich., 481, the court say:

“The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with the view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state.”

This language is quoted with approval in *Heffner v. City of Toledo*, supra. See also *McQuillan*, “*Municipal Corporations*,” Section 681.

Obviously the ordinance as passed contains two subjects; first, the granting to the defendant of a franchise, or rather, giving its consent to the defendant to use and occupy its streets, alleys and public grounds for the erection and installation of its poles, wires and other necessary appliances, to furnish heat, power and light to the village and its citizens. Second, the purchase by the defendant of the municipal lighting plant, at that time owned and operated by the village. These two subjects are clearly distinct and separate as to subject-matter, for it is provided in Sec-

tion 8 that unless the defendant purchased and paid for this lighting plant, in accordance with its offer to the board of trustees of public affairs, and the purchase price was accepted by said board, the consent or grant failed and the whole ordinance became void. It is quite obvious that some members of the council may have believed that the price paid for the plant was wholly inadequate, but were induced to vote for the ordinance by reason of the apparently liberal terms the defendant was willing to concede by its acceptance of the ordinance, but no one can say how the negotiations would have terminated if the council had been given an opportunity to vote separately upon each proposition or subject embraced in the ordinance. A larger price might have been received or more liberal concessions as to service and charges might have been conceded by the defendant. It might therefore be held that the ordinance was illegally passed and of no binding effect, except as affected by the retention of benefits, acceptance, user and estoppel. We are not, however, inclined to base a decision on the questions raised wholly upon this point alone, as we believe there is a broader and more paramount issue or principle involved.

Waiving the illegality of the ordinance, which we think clear and unmistakable, we proceed to a consideration of the more important question directly affecting the general welfare and the public policy of the state; that is, if we eliminate Section 8 of the ordinance and leave the parties, so far as the sale of the village lighting plant and payment therefor is concerned, in *statu quo*, we find that the ordinance, assuming its validity for the time being, is a mere grant or franchise or consent by the village of Lakewood that the defendant may use and occupy the streets, lanes, alleys and public grounds of the village with its necessary appliances and equipment "for the purpose of furnishing said village, the general public and private persons light, heat and power by electric currents." So far as extensions and additions are concerned, the grant is perpetual and is not affected by the ten year limit of proprietary contracts.

The question is now squarely presented: Had the village of Lakewood, on March 18, 1907, the authority and power to preclude and foreclose the state of Ohio from the exercise of its

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police power to regulate and prescribe the mode and manner in which a public utility should perform its functions toward all its citizens equally, equitably and without discrimination, and prevent extortion and unjust charges for extensions and service?

As here used, by "utility" is meant "that property in any object whereby, it tends to produce benefits, advantage, pleasure, good or happiness" (*Jevons Pol. Econ.*, p. 42). By "public utility," of course, is meant a utility whose benefits and advantages are open to and shared in by all, and not limited to any particular class of the community.

Plaintiff claims that the acceptance of the ordinance, and especially Section 6 thereof, by the defendant constitutes a binding contract which is protected by both state and federal constitutional inhibitions against the passage of laws impairing the validity or obligation of contracts, but it has been frequently held that even a charter contract does not prevent the operation of the police power, when invoked to protect the public peace, safety, health and morals. Even the state itself can not bargain or barter away its police power. The police power of the state is the authority conferred upon all states under the American constitutional system, to adopt such laws and regulations, in addition to those intended to prevent crimes and offenses, as tend generally to secure "the comfort, health and prosperity of the state, by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and securing to each an uninterrupted enjoyment of all the privileges conferred upon him by the laws of his country."

A consideration of the *raison d'être* of the power may be more illuminating than an attempted definition. A primary object of society is the security which was found essential by men confronted with the same dangers and difficulties the very moment a social state was organized on any part of the earth. Every man in a social state or in society has certain rights, sometimes called natural rights, but to obtain for all equality in the enjoyment of rights and avoid conflicts, every right is necessarily limited by a duty. Right and duty both spring from conscience and are based upon moral rules and obligations existing anterior to the positive laws created by the social state. Right and duty

are the cornerstones of freedom and liberty, as the sources of action, and this simply means that the objects of society can not be attained unless its individual members are willing to divest themselves of the exercise of such rights as would, if exercised, prevent society from attaining its objects and purposes, for every citizen must, in consideration of the protection of his rights, accept all the duties which society imposes, as society would cease to exist if there was no constraining power requiring the co-operation of all to attain the ultimate objects and purposes of society.

This view of the right of a state to regulate the conduct of its citizens Ranney, J., had in mind in *Railroad Co. v. Keary*, 3 O. S., 202. See page 206. Shaw, C. J., had the same view in mind in *Commonwealth v. Alger*, 7 Cush., 85.

The rule is very explicitly stated by *Cooley, Con. Lim.*, page 833, 7th Ed., where, speaking of the police power of the state he says:

“The occasions to consider this subject, in its bearings upon the clause of the Constitution of the United States which forbids the states passing any laws impairing the obligation of contracts, have been frequent and varied; and it has been held without dissent that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. *All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity.*”

No language could be clearer or more explicit than this. The statement that all contracts and all rights are subject to the police power, leaves nothing to be inferred, and the statement by this learned writer that not only may regulations which affect contracts be established by the state, but that all such regulations must be subject to change from time to time, as the gen-

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eral well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity, is the clearest and most far reaching statement or exposition of the police power of the state that has come under our observation. Many authorities are cited by the author to sustain these broad general statements.

The leading case is perhaps the case of *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt., 140. The question arose under the provisions in the Vermont statutes which required railroad corporations to erect and maintain fences and cattle-guards on the line of their roads, and it was held by the court that the right of the Legislature, by the general statute, to require all railroads, whether now in operation or to be hereafter chartered or built, to fence their roads and provide sufficient cattle-guards at farm and road crossings, was undisputed, and this it was said was—

“Perhaps, no more than the enunciation of a general principle applicable to all free states, and which can not, therefore, be violated so as to deprive the Legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is, of course always, in such cases, subject to the superior control of the Legislature. That is a responsibility which legislatures can not divest themselves of, if they would.”

In *Beer Co. v. Massachusetts*, 97 U. S., 25, the court, in the syllabus, say:

“As the police powers of a state extend to the protection of the lives, health and property of her citizens, the maintenance of good order, and the preservation of the public morals, the Legislature can not, by any contract, divest itself of the power to provide for these objects.”

In the case of *Charles River Bridge v. Warren Bridge*, 11 Peters, 548, Taney, C. J., says:

“The continued existence of a government would be of no great value if, by implications and presumptions, it was dis-

armed of the powers necessary to accomplish the ends of its creation.”

In the case of *State of Maryland, etc., v. B. & O. Ry. Co.*, 22 Wall., 105, it appears that the State of Maryland, in 1836, passed a law making a subscription of three million dollars to the B. & O. R. R. Co., but providing if the company did not locate the road as provided in the act, the company should pay a forfeit of one million dollars to the state. In March, 1841, the state passed another act, changing the route. It was held that this was a matter of state policy which it had a right to change if the policy was afterwards discovered to be erroneous.

The modern decisions in support of these principles are very numerous, but an inspection or analysis of these cases will disclose that they are mere affirmations or amplifications of this well established doctrine. While it is conceded that the police power may not encroach upon vested rights, yet it must also be conceded that any corporation, including a municipal corporation, whether its charter is subject to amendment or not, is always subject to the exercise of those general police powers of the state which have for their object the regulation of rights for the common good of the general public, the purpose of the power not being to take away rights, but by appropriate regulation to harmonize and equalize the enjoyment of rights by all citizens. It can not be said that a mere expectation, based upon an anticipated continuance of present general laws, confers a vested right. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance or a direct engagement has been made limiting legislative power over and producing an obligation. *State Bank of Ohio v. Knoop*, 16 How., 408; *Morton v. Nebraska*, 21 Wall., 660-673.

The right of the state to exercise the power of regulation over public service corporations is so essential to the public welfare that any injudicious limitation of the power or any attempt to contract not to exercise it might result in depriving the state of some of its attributes of sovereignty and prevent it from fulfilling the very objects and purposes of its creation. To pro-

vide for the public welfare of the state at large and of individuals or citizens collectively, is the highest function of government, the main purpose of which is to secure the greatest good to the greatest number. The most striking illustration of the exercise of this power is found in prohibition statutes, which, claiming justification in reasons of supreme public benefit, practically confiscate private property. Another illustration may be seen in the enactment of laws which permit the destruction of private property, in order to prevent the spread of a conflagration or fire which threatens destruction of a city. Such laws proceed upon the theory of accomplishing the greatest good for the greatest number. Under modern industrial and commercial conditions, public service corporations have become so powerful that to deny the right of the state to regulate their activities at any time would be destructive of the social and economical life of the people.

A brief examination of a few of the modern authorities cited may not be unprofitable.

In *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U. S., 265, the object of the suit decided in the case was to restrain the enforcement of certain ordinances which fixed the rates to be charged for telephone service. The court in the syllabus said:

"Only the Legislature of a state, or a municipality specifically authorized thereto by the Legislature, can surrender by contract a governmental power such as fixing rates. To grant a corporation the right to charge a specified rate for a specified time, suspends for such period the governmental power of fixing and regulating rates, and in construing the franchise, all doubts, both as to the existence of the contract and authority to make it, *must be resolved against such suspension of power.*"

In *Woodburn v. Public Service Corporation*, 82 Ore., 114, it is held in the syllabus:

"If a telephone company's franchise from a city, limiting rates to be charged, is deemed a contract, the mere fact that it was made prior to the enactment of the public utility act and before the state attempted to regulate such rates, does not debar the state from increasing the rates as fixed in the franchise, be-

cause when the state exercises its police power, it does not work any impairment of the obligation of the contract; the possibility of the exercise of such power being an implied term of the contract."

Or, in other words, the council, in passing Section 6 of the ordinance of the village of Lakewood under consideration, it must be held had in contemplation the possibility of the exercise of the power of the state to change its terms, and that the contract, if it can be called a contract, was made in contemplation of such exercise of power, and that such exercise of power was a part of the contract.

In the *City of Benwood v. Public Service Com.*, 83 S. E., 295, the Supreme Court of Appeals of West Virginia held, as a matter of law, in the syllabus that:

"Where, by franchise or ordinance, public service rates within a municipality have been fixed and accepted as between a public service corporation and the public, without express delegation of power in such particular by the Legislature to the municipality, a change of the rates by the public service commission does not impair the obligation of a contract."

It must be held that at the time the village of Lakewood passed the ordinance in question, there was in the enumeration of powers conferred by the state upon municipalities no "express delegation of power to fix rates for extensions, additions or charges." For, as was held in *Charleston Lighting Co. v. City of Charleston*, 75 S. E., 390:

"The state will not be presumed to have intended to delegate to municipal corporations the power to fix the charges of public service corporations, unless such intention is clearly and unmistakably expressed."

Such clear and unmistakable delegation of power to the municipal corporations of Ohio can not be found in the enumeration of powers under which such municipal corporations were operating at the time this ordinance was passed.

In *Collingswood Sewerage Co. v. Borough of Collingswood*, 102 Atl., 901, the Supreme Court of New Jersey expressly held in the syllabus that:

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“An ordinance granting consent of a municipality to the incorporation of a sewerage company under the act of 1898, and fixing maximum and minimum rates, is a grant upon condition, rather than a contract. The Legislature may clothe a public commission with power to fix higher rates, upon petition by the sewerage company.”

It must be remembered that whatever may be said relative to private corporations, the Legislature has power at any time to alter, modify or amend the general enumeration of powers conferred upon municipalities. When the court in this case said that the grant to the sewerage company was a grant upon condition, rather than a contract, the same may be said with respect to the grant by the village of Lakewood, if the ordinance under consideration was legally passed, that is, it was a grant upon condition that the same might be modified, changed or restricted by the Legislature at its pleasure.

Numerous other modern cases might be cited to the same effect, but we think the cases here cited are sufficient to justify the observation of the court that modern authorities in effect only affirm or amplify the general principles laid down by Judge Cooley and the other older authorities already cited.

Before taking up the scope and purpose of the public utilities act, it may be well to inquire if Section 6 of the ordinance under discussion, assuming its validity, constitutes a contract between the city of Lakewood, as the successor of the village of Lakewood, and the defendant. It will be noted that this section provides that extensions shall be made and light furnished—

“Whenever contracts with ‘*private consumers*’ can be secured, at the rate of one for each three hundred feet of overhead extension desired.”

If this is a contract, evidently it runs in favor of certain persons and not to the plaintiff in its proprietary capacity, nor to the citizens of the plaintiff city generally. It does not provide that the city of Lakewood, in its proprietary right, may demand extensions to furnish light to its streets or public buildings, even if the location of the streets or the public buildings bring them within the provisions of this section of

the ordinance. That the ordinance unjustly discriminates as between citizens must be admitted.

Suppose, for instance, the defendant's wires are installed on West Madison avenue, which runs due east and west through Lakewood, and that a new street is opened, running north and south across West Madison avenue, and on this new street one residence is located, just 300 feet south from the intersection, he would be entitled to light. But suppose a residence or factory is located 305 feet north of the intersection; it is denied light or power unless the defendant sees fit to make the extension without cost. This is clearly an unreasonable discrimination.

Under the provisions of the public utilities act, the city or an individual complying with the provisions of the act, may compel the defendant to make extensions and furnish heat, light, or power if, in the opinion of the commission, the demand therefor is reasonable under all the circumstances. It is indeed difficult to understand how Section 6 of this ordinance confers any right upon anyone that is consistent with the rights of others and of the public policy of the state.

We think the most that can be said is that it is a grant on condition that the state may not see fit to enact regulations governing the extensions, additions and service. Or, in other words, can the right be said to be more than a mere expectation based upon an anticipated continuance of the general laws of the state in force at the time the ordinance was passed?

Kent defines a right as that which anyone is entitled to have or to do or to require from others, within the limits prescribed by law, but as we have seen, rights are limited by duties which impose upon each man the obligation not to exact under color of law rights or privileges which are denied to his neighbor. In this age of Cyclopean competition between gigantic corporations, capitalized, organized and marshalled to produce results regardless of consequences, the necessity for wise and judicious state control and regulation of these competitive industrial and commercial agencies and forces become supremely important to the welfare of the community, as well as the individual. The ever increasing complexities of modern social, industrial and business relations render such control vital and paramount.

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Before it can be said that a municipality can, in advance, by ordinance or contract, foreclose the state from exercising this right of regulation, it must appear beyond question that the right was clearly and unmistakably conferred by the Legislature, and if the statute conferring such authority amounts to a waiver of the right of the state to exercise its sovereign power to prevent discrimination, extortion and wrong, then such statute will be held unconstitutional, for surely even the state may not contract or bargain away its police powers.

It has been frequently held in this state that in a comprehensive sense, the police power of the state embraces the state's whole system of internal regulation, by which the state seeks not only to preserve public order, but also to establish for the intercourse of citizens with citizens, those rules and regulations which are calculated to prevent a conflict of rights and to secure to each an uninterrupted enjoyment of his own rights, so far as is reasonably consistent with the like enjoyment of rights by others. (*Seemer v. State*, 21 O. C. C., 440.) It may be necessary to summarize in a general way the provisions of the public utilities acts to ascertain if their purposes do not fall strictly within this classification of internal state regulation.

Before 1911, the regulation of public service corporations was practically confined to railroads, street railways and common carriers. On May 31, 1911, the General Assembly passed an act, changing the name of the railroad commission which had charge of the regulation of such public service corporations, to that of the public service commission, defining its powers and duties with respect to public utilities. O. L. 102, 549.

On April 18, 1913, another act was passed to "Create the Public Utilities Commission of Ohio, to prescribe its organization, its powers and its duties," and to repeal certain sections of the former act. O. L. 103, 804.

In these two acts will be found the statutes regulating public utilities now in force in Ohio. The Public Utilities Commission is vested with plenary power and jurisdiction to supervise and regulate all public utilities, including electric power and light companies, within the limits prescribed by the provisions of these acts.

“The powers of the Public Utilities Commission are conferred by statute, and it possesses no authority other than that vested in it.” *Cincinnati v. Public Utilities Com.*, 96 O. S., 270.

An examination of the act as a whole, however, clearly discloses that these powers are quite large and cover the whole field of regulation, and sharply restrict and limit the authority of municipal corporations to make valid franchise contracts with a public service utility, unless the power to do so is clearly conferred upon it. Where such power of control is clearly conferred upon a municipality, the Commission can not change rates provided for in a valid contract between such municipality and a public utility (*Interurban Ry. Co. v. Public Utilities Com.*, 97 O. S., —). The opinion in this case has not yet been published. The syllabus, however, will be found in the *Ohio Law Reporter* of July 1, 1918, page 87. A copy of the opinion, however, is before the court, and as it contains the last word upon this subject by the Supreme Court, some reference to it will not be inappropriate.

The court had under consideration certain grants by different municipalities and counties through which the complainant, an interurban railway company, runs. At the time these grants were made by these sub-divisions of the state, the power to do so was conferred by Section 3443, Revised Statutes now 9113, General Code, which provides, among other things that the—

“Council and commissioners (of counties) shall have power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated.”

It will be here observed that the power to make a contract protected by constitutional guarantees, is clearly and unmistakably conferred. The Supreme Court was careful, however, to point out that there was a limit even to the delegation of such power by the Legislature. Parts 2 and 3 of the syllabus are as follows:

“2. The state can not be deprived of its right to the proper exercise of the police power; and none of its sub-divisions can bind itself by contracts which are or which may become deleterious to the peace, order, health or morals of the people.

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“3. A contract concerning the proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the constitution, and the police power can not be invoked to abrogate or impair it.”

We have here by plain intimation, if not in express terms, a clear and emphatic declaration that a state can not confer upon one of its sub-divisions power to make contracts which are harmful “or which may become deleterious to the peace, order, health or morals of the people.” Or, in other words, the state can not barter or bargain away an authority or sovereignty essentially necessary to enable it to accomplish the object and purposes of its creation. The rule laid down is simply this, that “in the exercise of power clearly conferred,” a municipality may contract concerning proprietary rights, provided the contract in itself is not injurious or harmful to the public welfare. A proprietary right is the right of an owner or proprietor, and a contract or stipulation for the benefit of a limited number of “private consumers,” as provided for in Section 6 of the ordinance under consideration, is quite obviously not a contract between the village of Lakewood, in its proprietary capacity, and the defendant as a public utility.

In *Peoples Telephone Co. v. Lewis*, 151 Wis., 75, the court had under consideration a special contract made between the telephone company and a stockholder, which was executed before the passage of the public utilities act in that state. This contract was embodied in a stock certificate issued to the stockholder. It was held that this was a valid contract, as it was protected by Section 1797-M-91 of the utilities act, which provides that—

“The furnishing by any public utility, of any product or service, at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination within the meaning specified.”

It will be noticed that this section was copied almost literally by the General Assembly of Ohio several years later, and is now a part of the public utilities act to which reference will

be hereafter made. It was sought to distinguish this case from the case of *Superior v. Douglas Telephone Co.*, 141 Wis., 363, where the city of Superior, in its proprietary capacity, entered into a contract as a consumer for free telephone service, but the court clearly distinguishes the difference between the two cases, holding that in the latter case the city of Superior in its proprietary character, entered into a contract for free telephone service with an existing telephone company for a valuable consideration, the consideration being that the telephone company agreed to maintain a certain number of free telephones for the City of Superior, in consideration of the city permitting it to make alterations in the city hall or public buildings, for the express use and benefit of the telephone company.

There are three classes of contracts which a public service corporation may make with a municipality and its inhabitants; first, contracts with the municipality in its proprietary capacity. These, if not harmful or contrary to public policy, and provided the consideration is not compensation for the consent to occupy its streets and public places, are not inhibited by the public utilities act. Second, contracts with individuals, patrons of customers. These, unless unreasonably unjust or unconscionable, are saved by Section 614-19, General Code. Third, contracts which form an element of or are in effect created by the corporate franchise or grant given to the public service corporation as a part of its consent to the use and occupancy of its streets and public places. All these are subject to and are superseded by the public utilities act, unless the authority conferred by the state upon the municipality with respect to such grants is clear and unmistakable.

In *Peoples Telephone Co. v. Lewis*, 151 Wis., *supra*, the court, in construing the section of the Wisconsin act from which Section 614-19, General Code, is copied, says, page 77:

“This section was held, in *Superior City v. Douglas*, 141 Wis., 363, to have been intended to preserve existing agreements with public utility corporations from being affected by the public utility law, and to be efficient for that purpose as to mere contractual matters, such as ordinarily occur *inter partes*. * * * Such ordinary contracts being distinguished from such as form an

element of a corporate franchise, *the latter being held superseded by the Public Utility Law,*"

while the former are preserved by the saving clause or section referred to.

By Section 6 of the ordinance under consideration, the village of Lakewood undertook to perpetually preclude and foreclose the power of the state to regulate the charges of the defendant as a public utility to all prospective consumers of electric current in the village of Lakewood, except a limited number who might possibly fall within its provisions. This we hold it had no right to do, and its act in so doing was *ultra vires*. The validity of this ordinance and the grant therein made is to be determined by the laws in effect and in force at the time it was passed, and as we have seen, the only grant of power to the village at that time with respect to electric light plants was contained in paragraph 15 of Section 1536-100 Revised Statutes, which only conferred upon the village authority to erect, install, maintain and operate an electric light plant for its own use, in its proprietary capacity. This statute did not confer upon the village authority to erect and operate such plant for the purpose of supplying electric light to its citizens. *Jackson, a tax-payer, etc., v. City of Nelsonville, supra.*

Nor did this statute confer upon the village authority to contract with others to furnish its citizens with such light. This is quite evident from the language of the constitutional amendment of September, 1912 (Section 4, Article XVIII), which gives municipalities plenary power to own, construct, lease or operate public utilities.

"The product or service of which is to be supplied to the municipality or its inhabitants, and *may contract with others* for such product or service."

It is quite evident that the members of the constitutional convention had serious doubts that municipalities had such power or that the Legislature could confer it, in the absence of a constitutional provision to that effect. Prior to this constitutional amendment, no one will contend that a municipality had any in-

herent right to construct, own and operate a public utility, outside of the maintenance and operation of water works, and the courts have been inclined to doubt whether the legislatures of the states could confer such power.

A brief resume of the scope and the purpose of the public utilities acts may not be inappropriate. These acts provide, in a general way, that every public utility shall furnish necessary and adequate service, which shall be reasonable and just, and that every unjust or unreasonable charge for such service is prohibited and declared unlawful. No public utility shall give any undue or unreasonable preference or advantage to any person, firm, corporation or locality. The law provides that public utilities shall print and file with the commission within ninety days after the act takes effect, schedules showing rates, classifications and charges for service, but any firm, person or corporation may take exception to such schedules if they are in any respect unjust, unreasonable, preferential or discriminatory, or in violation of law, and this complaint the commission must hear and determine.

The council of a municipality is given power, whenever an application is filed with it by any person, firm or corporation, to require by ordinance or otherwise, the public utility to make such additions or extensions to its distributing plant within the municipality, which shall be deemed reasonable and necessary in the the interest of the public. Any requirements or orders made by the council, however, are subject to review by the commission, and in determining the practicability of such additions and extensions, the council and the Public Utilities Commission shall take into consideration the supply of the product furnished by such public utility available and the returns upon the interest, and expense of constructing such extensions and additions, and the amount of revenue to be derived therefrom, as well as the earning power of the public utility as a whole.

Re-hearings may be had before the Public Utilities Commission by any party who feels aggrieved by any order made by such commission, and if upon such re-hearing, any party is dissatisfied with the final order made by the commission, proceedings may be had to obtain a reversal, vacation or modification thereof, by petition in error filed in the Supreme Court of this state.

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That is, any decision rendered by the commission is appealable to and may be reviewed by the Supreme Court.

When the defendant in this case filed its schedule of charges for extensions and service, as alleged in its second defense, the plaintiff could have demanded a rehearing, and if not satisfied with the conclusions reached by the commission, an appeal could have been taken to the Supreme Court of the state.

Before the enactment of the utilities statutes, the need of extending regulation of all public utilities to every public service corporation was recognized and enforced in many states long before the state of Ohio awoke to the necessity for such regulation. The provisions of our statutes are copied in large measure from the laws of these states. The purpose and object of this legislation is quite obvious and apparent. On the one hand, public service corporations were constantly growing powerful, aggressive and extortionate. On the other hand, the councils of municipalities, so far as they had the power or authority, were enforcing upon these corporations burdensome and onerous restrictions and obligatory duties, and where they did not have the power, councils were attempting to exercise it, and public service corporations were constantly called upon to combat the passage of discriminatory ordinances. The primary object of all public utilities legislation is to obtain for *all* citizens of the state, without discrimination, the best possible service consistent with the practical operation of the utility and the payment to its stockholders of a fair and reasonable dividend upon the capital invested. More than this the state can not justly demand, nor can a public service corporation in justice be expected to accept less. While the creation of corporations is a state function, and while corporations are, as a rule, organized under general laws, yet certain corporations are created and owe their existence to special acts and derive their powers therefrom.

The defendant claims it falls within the latter class and that it was organized under and derives its powers from an act of the General Assembly passed January 26, 1887 (84 O. L., 7), which made the laws relating to magnetic telegraph companies applicable, so far as practicable, to electric light and power companies, and therefore its right and power to occupy the streets

of a municipality was derived directly from the state. The act of the General Assembly of April 21, 1896 (92 O. L., 205), now Sections 9192 and 9193, General Code, however, provide that such companies shall not occupy the streets, lanes and alleys with their equipment, to conduct through and thereon electricity for lighting, heating and power purposes "without the consent of such municipality."

The plaintiff contends that the effect of this act of 1896, Sections 9192 and 9193, General Code, is to subject such companies to municipal control alone, and cites *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky*, 93 O. S., 428, in support of its contention. The only question decided in this case is that when an electric light and power company which has occupied the streets and public places of a city or village with its equipment, voluntarily and without the consent of the municipality, withdraws its service and removes and dismantles a portion of its equipment, it can not again return and repossess itself of its rights without the consent of the municipality.

It is somewhat doubtful if the doctrine of this case sustains the contention of the plaintiff, and it is equally as doubtful if it leaves the claim of the defendant, that it derives its power to occupy the streets of a municipality from the state, wholly intact. The doctrine of *Hardin-Wyandot Lighting Co. v. Village of Upper Sandusky*, 93 O. S., supra, is largely to the effect that the Legislature, for reasons appearing sufficient, in April, 1896, made the right of electric light and power companies to occupy the streets and public places of cities and villages with their poles, wires, and other equipment, dependent upon the consent of the municipality; that the rights of these companies as corporations deriving powers directly from the state under the magnetic telegraph act, still in great measure persist, is quite evident from Section 9179, General Code, which expressly provides that the municipality shall not demand or receive any compensation for such consent. The municipality may give or refuse its consent to such corporations to occupy its streets and public places, but it has no power to give its consent upon terms as to charges and service that the state may not change from time to time, as circumstances and changing conditions may demand

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or render necessary for the public welfare, unless, as has been said, the power to do so is expressly and in express terms conferred.

The able and learned judge who wrote the opinion in *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S., *supra*, says on page 439 that—

“The act of 1896 disclosed that the Legislature was not content to clothe the electric light companies in municipalities with the same powers with which it had vested telegraph and telephone companies. The change was made in the light of experience. * * * There is a clear distinction between telegraph and telephone companies on the one hand, and electric light companies on the other. * * * Telegraph and telephone company systems pervade the entire state. They pass in and out of cities and villages and through the rural districts, connecting the whole in a vast net-work. * * * As a general rule, an electric light company is formed for the purpose of furnishing light to the municipality in which it is located and to its people.”

It is quite evident that, if not *all*, at least *some* of the powers conferred by Section 9170, *et seq.* General Code, still remain with the electric light and power companies, and that it applies, to some extent at least, to a class of corporations deriving powers directly from the state, and because of this fact alone, the claim of the defendant that Section 6 of the ordinance under consideration is *ultra vires* of the power of the village of Lakewood, has considerable merit. The claim of the able and learned judge, however, that there is a clear distinction between a telegraph and telephone company, so far as it is based upon the reason that—

“as a general rule, an electric light company is formed for the purpose of furnishing light to the municipality in which it is located and to its people,”

while in the main true when the opinion was written, can not be accepted in the light of conditions now prevailing.

Science never sleeps. Progress in the application of natural forces is only limited to the capacity of mind organized to grasp and utilize potential possibilities to an extent not even dreamed of a few years ago. There is a large electric generating plant in West Virginia near the Ohio River that is transmitting electricity for power and other purposes to the city of Canton, and is under

contract to extend its lines to the city of Akron, only a few miles from the city of Cleveland. In the state of Montana, the tremendous water power facilities of the Rocky Mountains are being utilized to generate electric current that is transmitted all over the state and is being successfully used by railroads as a motive force instead of steam on their heaviest or steepest grades. A few years ago the cost of transmitting electric energy any considerable distance was prohibitive. This was mainly due to the fact that the insulation was lead covered cables, which because of weight, required short pole spacing, but a very much lighter insulation has been discovered, and current is now carried on the ordinary standard pole lines. Such current and power is now transmitted on the line of the St. Paul Railway Company a distance of 690 miles.

Again, by the use of high frequency changes, alternating currents of one hundred thousand volts may be transmitted long distances. The current is transformed or stepped up at the generating station by remarkably efficient machinery, and stepped down at any point desired and used at low pressure. It is simply a question of cost as between freight charges on coal and the erection of lines for the transmission of electric current. Undoubtedly in the near future the defendant in this case, instead of paying freight on coal from the mines to the city of Cleveland, will generate its power and energy at some point where the coal is mined, and transmit it over wires to points of designation. Even the dangers apprehended by the able and learned judge are being rapidly eliminated or at least very greatly minimized. Even today, in the language of this learned judge, electric light and power systems "pervade the entire state, they pass in and out of cities and villages and through the rural districts, connecting the whole in a vast net-work." Not only is that true in this state, but it is true in most states, especially in the west where water power is available.

In this age, when man, with strident voice, "winged with red lightning," throws the news of a great victory from Eiffel Tower in the city of Paris into etheric space, and almost instantly silently plucks it out of the air at Washington, D. C., judicial decisions can not be wholly based upon conditions that, though

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they seem miraculous today, may tomorrow be discarded as being antiquated and obsolete. The day is at hand when the denizen of the country, as well as of the city, will be using for light, heat and power, electricity transmitted on pulsing wires from generating plants a thousand miles away.

When the General Assembly placed electric light and power companies in the same class with telegraph companies, it unconsciously performed an act that was prophetic of coming events that cast light, not shadows, before. The possibilities for purposes of production, transportation, and social comfort of this natural force, the latest harnessed by man and made the genii of his will, are unthinkable and are such as were never dreamed of in Utopia or conceived in the highly specialized imaginative brain of Jules Verne.

Section 21 of the act of May 31, 1911 (O. L., 102), 549, now Section 614-19, General Code), provides that—

“The furnishing by any public utility of any product or service, at the rates and upon the terms and conditions provided for in any existing contract, executed prior to the passage of this act, shall not be construed as constituting a discrimination, or undue or unreasonable preference, or advantage within the meaning specified.”

This is substantially the language used in Section 1797-M-91 of the Wisconsin statute, passed in 1907, and it was undoubtedly copied from that act. It is a well recognized proposition of law that where a statute is largely taken or borrowed from another state, the interpretation placed upon it in the state where it originated will govern in any state that subsequently adopts it, and there is a presumption that the General Assembly of Ohio, in adopting this language and the terms used, had the construction placed upon it in Wisconsin in view.

In *Kenosha v. Kenosha Home Telephone Co.*, 149 Wis., 338, it was held that the contract referred to in this provision of the law was a contract between the utility and one of its consumers or patrons. See also the cases of *Superior v. Douglas Telephone Co.*, 141 Wis., 363, and *Peoples Telephone Co. v. Lewis*, 151 Wis., 75, already referred to.

The so-called contract in Section 6 of the ordinance under consideration is not saved by this section, as it is, if anything, merely such right as forms an element of a corporate franchise which is superseded by the public utilities act or any amendments thereto that the state may deem essential to enact in the interest of the public welfare. Obviously if a contract in any sense, it must be held that whatever force or validity can be claimed for it, must be based upon the corporate grant or franchise of the village of Lakewood to the defendant. By no possible interpretation can it be said to be a contract between the defendant and the village in its proprietary capacity, or between the defendant and those "private consumers," for whose benefit it was inserted in the ordinance.

Counsel for plaintiff has filed a supplemental brief, in which it is claimed the power of the village to pass the ordinance under consideration is amply conferred by Section 3471a, Revised Statutes, (84 O. L., 7), and other statutes in force at that time. This Section 3471a, Revised Statutes, was amended in 1896 (92 O. L., 205), and is now practically embodied in Sections 9192 and 9193, General Code. In *Light Co. v. Upper Sandusky*, *supra*, the court said, page 441, that the purpose of the amendment "was to invest the municipality itself with power to make the grant." Further the court says:

"The elimination of Section 3461, Revised Statutes, and the use of the word 'alone,' abrogates the power of the probate court to act in such cases, and this is followed by the express provision requiring the *consent* of the municipality."

The court is therefore convinced that Sections 9170, *et seq.*, General Code, as now in force, do not "clothe electric light companies with *all* the powers of telegraph and telephone companies." The court is careful to avoid saying that electric light companies are not clothed with some of the powers of telegraph and telephone companies. Section 3471a, with the amendment thereto, relate to powers and rights of the utility corporations referred to, rather than to powers conferred upon municipalities. The same may be said with respect to Section 3471-3, Revised Statutes, now 9195, General Code, as well as the other sections cited.

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The most that can be claimed for any of the statutes cited is that by implication some power of regulation is reserved in the statutes in force in 1907 to municipalities with respect to electric light and power companies, but, as has been seen, the overwhelming weight of authority is that a municipality can not preclude or foreclose the state from the exercise of its police power of regulation, unless the authority to do so is clearly and unmistakably conferred.

Much reliance is placed upon the *City of Columbus v. Columbus Public Service Co.*, in which the common pleas court, Dillon, J., held (4 N. P. [N.S.], 329) that—

“There is an entire absence of express power, either in the municipal code or previous statutory provisions, whereby a municipality may grant to a lighting company the right to jointly use municipal poles.”

The decree of the common pleas court was reversed by the circuit court, which action of the circuit court was affirmed by the Supreme Court without report. 78 O. S., 392.

A judicial decision can only serve or operate as a precedent for future determinations in similar or analogous cases, that is, the facts in the case in which the precedent is invoked as a governing or controlling rule, though differing in some degrees, must be closely alike or similar to the facts in the case in which the previous decision was rendered.

The facts in this case are that the city of Columbus owned a municipal lighting plant, and by ordinance in 1902, granted the light company authority to use its poles, that is, gave its consent to the public service company to string its wires on the city's poles. As the law then stood, as we have seen, a municipality had the right to give its consent to an electric light and power company to occupy its streets, alleys and public places with its equipment, for the purpose of furnishing light to its people, and having this power, it surely had that power to permit such a company the joint use of its own poles for the same or similar purpose.

The facts in this case differ very materially and are in no respect analogous to the facts in *Jackson v. Nelsonville*, supra. In

the latter case, the City of Nelsonville, in 1905, owned and had in operation a municipal electric light plant for use in its proprietary capacity. In December, 1905, the city proposed to enlarge this plant at public expense and furnish light to its citizens, and the suit was brought by Jackson, as a tax-payer, to enjoin the city from so doing. The real purpose of the plaintiff was to prevent the city from entering into competition with private electric light companies. No ordinance had been passed authorizing the city to furnish light to its inhabitants, but the case was not decided upon this point, as the question was squarely raised that the city had no implied or statutory power to furnish electric light to its citizens, and the distinction already referred to in Paragraph 15, Section 1536-100, Revised Statutes, that while the statute gave municipalities the right to provide, establish, maintain and operate natural gas plants, and to furnish the municipality and the inhabitants thereof with natural gas, it gave no power to a municipality to maintain municipal lighting, power and heating plants for the purpose of furnishing the inhabitants thereof with light, heat or power, was clearly pointed out in the briefs of the plaintiff in error. The language of the Supreme Court, in reversing the judgment of the circuit court, 77 O. S., 637, is

“Judgment reversed, because at the time of entering upon the enlarging of the electric plant, the statute conferred no authority for furnishing electricity to citizens.”

It will be noticed that the decision of the court is not based upon the fact that the city of Nelsonville had not passed an ordinance, or that the people of the city had not, by vote of its electors, given the municipality any authority to furnish electricity to its citizens, but the decision is squarely based upon the fact that the statute conferred no authority upon the municipality to furnish electricity to the citizens thereof.

That this view was held by the bar and the General Assembly is clearly indicated by the fact that on February 28, 1908, Section 1536-100, Revised Statutes (Section 7-0 Municipal Code), 99 O. L., 34 was amended to confer such power. This amendment is now embodied in Section 3618, General Code. The decision in

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Jackson v. Nelsonville was rendered February, 1908. The Legislature immediately proceeded to give to municipalities the power which the court said it did not have under the law as it then existed, to furnish electricity to its citizens.

It is therefore held:

First. The village of Lakewood has no authority, under its grant of power as a municipal corporation, in 1907 or before that time, to erect, maintain and operate an electric lighting plant for the purpose of furnishing its inhabitants with light, heat or power, and those of its inhabitants who had entered into contracts with the village for electricity for such purposes acquired no rights under such contracts that could be legally enforced.

Second. The village of Lakewood had a right to sell and transfer to the defendant, for a valuable consideration, its municipal lighting plant *in situ*, including all the appurtenances, appliances and equipment thereunto belonging, and having done so and having accepted and used for its benefit the price agreed upon, and the defendant having appropriated and entered into possession of the plant and equipment *in situ*, with the acquiescence and by virtue of the affirmative acts of the village, the transaction became *fait accompli*.

Third. The village and city of Lakewood having, by acquiescence and by affirmative acts, permitted the defendant to use and occupy its streets and public places with its equipment, and the defendant having furnished the village and city of Lakewood and its people with light, heat and power, uninterruptedly and without objection for nearly twelve years, the intention of the municipality to give to the defendant the consent to occupy its streets and public places with its equipment, provided by law, will be presumed, and because of this acquiescence, acceptance and user, the parties will be estopped from taking advantage of a situation created by their own acts and conduct.

Fourth. The ordinance of the village of Lakewood of March 18, 1907, No. 454, was illegally passed and therefore its provisions regulating charges for service extensions and additions are void and not binding upon either of the parties.

Fifth. If the ordinance had been legally passed or assuming its validity, the grant in Section 6 thereof does not constitute such

contract as is protected by constitutional provisions forbidding the enactment of laws impairing the obligations of contracts. The provisions of said Section 6 amount only to a grant or right upon condition, or a right based upon a mere expectation of the anticipated continuance of the laws then in force affecting such rights.

Sixth. The village of Lakewood in 1907 had, under the enumeration of powers granted to municipal corporations by the state, no authority to pass an ordinance containing the provisions of Section 6 of the ordinance of March 18, 1907, as such act on its part would be *ultra vires*, because, the grant being perpetual, it would preclude and foreclose the state from the exercise of its police powers to regulate the charges of and the mode of manner in which public utilities, shall perform their functions and render service equitably to all citizens without discrimination at any time, as necessity and changing circumstances demand.

Seventh. Contracts made between a public utility corporation and a municipality, in its proprietary capacity, not harmful to the public welfare, are not affected by the public utilities act; contracts entered into between such corporations and its patrons or customers individually, are protected by Section 614-19, General Code, unless contrary to public policy; contracts which inure to the benefit of the inhabitants of a municipality by virtue of a franchise granted a public utility corporation, and which grow out of and form an element of such franchise, are subject to and are superseded by the public utilities act, unless the power to grant such franchises and such rights is conferred by valid constitutional statutes in express, clear and unmistakable terms.

The petition will be dismissed, and notice of appeal noted on the court calendar.

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Mehr v. State.

INNOCENT POSSESSION OF A FISH NET.

Common Pleas Court of Licking County.

JOHN A. MEHR V. STATE OF OHIO.

Decided, 1918.

Possession of a fish net may be explained, and where it is evident no intention existed to use it in an unlawful manner, prosecution therefore does not lie.

Fitzgibbon, Montgomery & Black, for plaintiff in error.

James Schaller, Assistant Attorney-General, contra.

FULTON, J. (orally).

This is a petition in error filed in this court to reverse the finding of the justice of the peace. It is really submitted upon a question of law. The facts are: Mehr, while in California, followed deep-sea-fishing, and had nets in his possession there which were necessary to do such fishing, and which was perfectly lawful. He had been a resident of this county, and after he had been in California for three or four years he came back to Newark, rented property here, and moved all his belongings back here, and among them was this net. It seems that one of the game wardens went into his house and made an examination and found this net. He was arrested and tried for having it in his possession. The statute under which trial was had is a positive statute. The language is that any person who has in his possession a net which can be used for fishing is guilty and is liable to be fined. The justice who tried the case proceeded upon the theory that there was no exception, that is, if a man had a net in his possession, it made no difference how he got it, or what he got it for, if he had it, he was guilty under the statute. He would not permit any explanation, and found the defendant guilty under those facts.

The court thinks that the justice erred; that it was not the intention of the Legislature to cut out all explanation in regard to such a matter. The evidence did not show that he was using that net in any way or attempted to use it, or had done any-

thing with it at all, but merely had it in his possession. The court thinks that the defendant had a right to explain his possession of the net. You could not have found a jury which would have found the defendant guilty of violating this statute, because there was no intention to violate it.

The judgment of the justice of the peace will be reversed and the case dismissed.

ALLOWANCES OF ALIMONY.

Common Pleas Court of Franklin County.

J. WILLIAM HOWE v. DAISY HOWE.

Decided, December 20, 1918.

Divorce and Alimony—Property or Income of Husband—May be Subjected to Payment of a Judgment for Alimony—Three Alternative Rights Upon Which an Award May be Based.

Alimony based on the aggression of the husband may be allowed out of his real property, or out of tangible personal property, or if he has neither real or personal property but is dependent upon his earning powers and the wage or income produced thereby, the wife may be given a decree for money to be paid in gross or in installments out of the proceeds of his business, trade or occupation.

Ralph H. Henney and J. J. Chester, for plaintiff.

J. F. Atwood and H. L. Dowd, contra.

KINKEAD, J.

Plaintiff moves the court to set aside the order made May 2d, 1910, and subsequent dates directing him to pay defendant \$65 per month alimony for the reason that the order was without authority of law. The order required plaintiff to pay the amount for his "property and earnings."

I find an order made March 2, 1910, granting defendant a divorce and ordering and decreeing that—

"alimony out of and charged upon the property and earnings of the plaintiff in the sum of sixty-five (\$65) per month, be-

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ginning with March 1, 1910, be and the same is hereby decreed and allowed as alimony to the said defendant, etc., * * * that said sum of \$65 per month allowed to the defendant as alimony herein shall be paid * * * on the first day of each and every month until the further order of the court."

In support of this motion *Lape v. Lape*, 28 O. C. A., 108* (Hamilton County Court of Appeals), is cited. It was held in this case that—

"An allowance of alimony to a wife can not be based on future personal earnings or wages of the husband, and where the allowance is made in connection with a decree for divorce to the wife on account of the aggression of her husband, it must be based on property owned by him at the time the decree is granted."

Two sections of the code prescribe the statutory powers of the court in entering judgment for alimony, viz: Section 11990 provides that when divorce is granted because of the husband's aggression the court may,

"allow such alimony *out of her husband's property* as it deems reasonable, having due regard to property which came to him by marriage and the value of his real and personal estate at the time of the divorce."

Section 11991 provides that:

"Such alimony may be allowed in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court deems equitable."

When the wife files her cross-petition for divorce and alimony upon the filing of a petition for divorce by the husband, Section 11998 provides in such case, when the proof substantiates the charges by the wife, the court may,

**Lape v. Lape* was reversed by the Supreme Court after this opinion was announced. For syllabus of *Lape v. Lape*, see *Ohio Law Reporter* of January 27th last.

“give judgment in favor of the wife for such alimony out of her husband’s property as is equitable, which may be allowed to her in real or personal property, or both, or in money, payable either in gross or by installments.”

It is well understood that the power of the court is strictly statutory, that the court has no general or incidental equity powers. *Stewart v. Stewart*, 20 N.P.(N.S.), 273.

The allowance in this case was made upon the petition of the wife; that is upon her cross-petition under Section 11998.

Section 11990 is a general section which applies whether the wife is a petitioner or cross-petitioner. Section 11998 seems also to be general. At any rate by the three provisions, Sections 11990, 11991 and 11998 alimony may be allowed “out of her husband’s property” (11990), or “in real or personal property or both” (11991), or “out of her husband’s property as is equitable, which may be allowed to her in real or personal property or both, or in money, payable either in gross or by installments.”

But Section 11991 provides that alimony *may* be allowed in real or personal property or both, *or by decreeing to her such sum of money, payable either in gross or installments, as the court deems equitable.*”

Sections 11990 and 11991 duplicate the provision that alimony *may* be allowed out of her husband’s *property*. Section 11990 uses the word *property* while 11991 uses the words “out of her husband’s *property* and “in real or personal property.”

Sections 11991 and 11998 contain the alternative, authorizing the court to allow alimony, out of property, “or” by “decree” or “judgment” to award it *in money payable either in gross or installments.*”

Appellate Judges Hamilton, Jones and Gorman held that—
“the trial court had power to decree alimony by way of payment of a specified sum each week, *provided the court found the husband to be possessed of property out of which the sum was allowed.*”

Discussing the record Hamilton states that at the time of hearing, the husband was possessed of both real and personal

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property, etc., and in the absence of anything to the contrary it will be presumed that the court proceed according to law and found the husband to be possessed of property out of which alimony could be legally decreed.

Judge Hamilton also states that a plain reading of Section 11990 discloses that:

“Alimony can be allowed only out of her husband’s property, and can not be based upon future personal earnings or future wages. Future personal earnings or future wages can not be considered as property.”

In *Frickel v. Granger*, 83 O. S., 101, the court observes that:

“Alimony is not a debt and payable as debt, damages or penalty; but is an award by the court upon consideration of equity.”

Judge Hamilton, in *Lape v. Lape*, *supra*, further states:

“A decree for alimony to the wife * * * must be based on property owned by the husband at the time of the granting of the divorce; and that a decree for alimony based on future personal earnings or future wages is not authorized under the statute. * * * Finding the husband to have property out of which alimony may be decreed, the court under Section 11991, G. C., has jurisdiction to order such alimony paid in weekly payments or other installments. *We hold that decreeing a specified sum to be paid each week is decreeing a sum of money within the meaning of the statutes.*”

I have thus quoted from this appellate court opinion for the purpose of pointing out what seems to me its want of reasoning.

If alimony *must* be allowed in real or personal property, an order of weekly or monthly payments, can not by any “hook or crook” of logical reasoning be considered as allowing alimony in real or personal property, unless we shall consider a matured obligation to pay money a species of personal property. Judge Hamilton and his associates evidently do not consider personal earnings to be personal property.

But a *chose in action* is property; money due for wages is a debt. A *chose in action* is a right to recover a debt or money.

A *chose* is classed as personal property. Bouvier's Dict., p. 483.

On this ground we think the appellate opinion is unsound. But a stronger reason for dissenting from the opinion is what appears to be the manifest import of both Sections 11991 and 11998.

Alimony may be allowed; First in real property, *or* second in personal property, *or* third, both; *or* fourth, by decreeing such sum of money, payable either in gross or installments.

Or is a co-ordinate conjunction that marks an *alternative*; that is, each mode of allowing alimony in real or personal property, or by decree or judgment for specific sum of money stand equal, or of the same order of importance. The word marks the connection between three separate independent modes of allowance of alimony, either one of which alternatives may be adopted and pursued by the court.

If the husband has real property alimony therein may be allowed. *Or* if he has tangible personal property alimony may be allowed out of such property. *Or* if he has neither real or personal tangible property, possessing nothing but his earning powers and daily, weekly or monthly income or wages, the court may adopt the third independent alternative and decree or adjudge to the wife a sum of money payable either in gross or installments.

This court is, therefore, of the opinion that, both under Sections 11991 and 11998, it has a third distinct and independent alternative right to "decree" or "give judgment" for money, to be made payable either in gross or installments payable out of money derived from the business, trade or occupation of the former husband.

The first ground of the motion to set aside the former order of the court will therefore be overruled.

However the court is inclined to sustain the second ground of motion to modify the former order now existing against plaintiff upon the further hearing of evidence. The court will order that the motion be set down for oral hearing upon evidence to be deduced by the parties. This case has been a reflection upon the court and parties, and it must come to a final conclusion in such way that there will be no more controversy.

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**EFFECT OF VOLUNTARY APPEARANCE OF HEIRS IN A PARTITION
SUIT TO WHICH THEY HAD NOT BEEN
MADE PARTIES.**

Common Pleas Court of Morgan County.

ALBERT C. NEWTON V. MARGARET HARRIS ET AL.

Decided, December 23, 1918.

Partition—Summons Not Necessary—In the Case of Heirs Not Made Parties Who Voluntarily Appear—Heirs of the Blood Not Estopped by Quit-Claim Deeds from Claiming by Descent.

1. In an action in partition where the plaintiff fails to make all the heirs parties but correctly describes all the lands sought to be partitioned, and the remaining heirs voluntarily appear and file answer correctly setting out the interests of each and all the heirs but making no cross demands, no further service of summons is necessary.
2. H, the wife of C, inherited from her father the undivided one-fifth of his real estate. C and H afterwards purchased the remaining four-fifths from the other heirs of her father, deeds having been made jointly to C and H. H dies intestate, without issue, C thereby inherits from H a life estate in the one-fifth which came to her by descent, and an estate in fee in her undivided two-fifths which came to her by purchase, under Sections 8573 and 8574, General Code. After H's death C procured quit-claim deeds from the heirs of H for their respective interests in the undivided one-fifth which she had inherited, the deeds being in ordinary form, describing the whole of the property without designating the respective portions of the grantors and with no recitals or covenants. All the heirs of H stand in equal degree in consanguinity, to-wit, nephews and nieces. C afterwards dies intestate and without issue, never having remarried, leaving two living, and four dead sisters, the latter having issue. *Held:* That the heirs of the blood of H are not estopped by their said deeds from claiming by descent from C; and under Section 8577, General Code, the heirs of the blood of H take one-half and the heirs of the blood of C take the other half of the two-fifths which descended to C from H under Section 8574, General Code.
3. In such case C is the common ancestor, and the descendants not being in a direct line of descent, and not being of an equal degree

in consanguinity, take *per stirpes*, under Sections 8582 and 8583, and not *per capita*, under Section 8581, General Code.

M. E. Danford, for plaintiff.

McDonald & Slabaugh, contra.

WEBER, J.

This is an action brought by Albert C. Newton for the partition of lands owned by the late Thomas D. Clancy, deceased, lying in Windsor and Meigsville townships. The petition is in the ordinary form. The heirs of the blood of the decedent only are made parties by the plaintiff. The petition was filed May 17, 1918. There were some unknown heirs who were later ascertained by plaintiff and they were individually made parties by amendment to the petition filed May 27, 1918. Waivers of summons were filed by some of these defendants and service was made on each of the other defendants named in said pleadings under praecipe filed by plaintiff.

On July 27, 1918, leave was obtained for some nineteen more persons, "heirs of Ann Henry Clancy" to be made defendants, some of whom on the same date voluntarily appeared and filed an answer and cross-petition, so called, through their counsel, McDonald & Slabaugh, and service was made upon the others as well as each and all the original parties to the action, including the plaintiff.

The cross-petition sets out two alleged causes of action, the first embodying the fee to 116.50 acres and also the coal underlying 80 acres described as "4th tract," and the second cause, a separate tract of 8.50 acres.

An issue is raised by these parties who claim an interest in the lands described in the pleadings, as nephews and nieces of "Ann Henry Clancy," who was the wife of Thomas D. Clancy. A brief history of so much of the title to these lands as is necessary for the determination of the questions involved appears in one of the briefs filed herein, from which I largely quote.

Some time prior to March 21, 1889, the date of a deed from Julia Clark to T. D. and A. H. Clancy, Robert Henry died intestate, leaving the following children as his heirs at law en-

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titled to inherit his estate, viz.; Julia Clark, Temperance Mellor, Robert S. Henry, Lillis Corry and Ann Henry Clancy. Ann Henry Clancy and Thomas D. Clancy purchased the undivided one-fifth interest of each of the other four sisters and brother and took title in the names of Thomas D. Clancy and Ann Henry Clancy. Then this real estate was owned as follows:

One-fifth was owned by Ann Henry Clancy by inheritance from her father, and two-fifths was owned by her by purchase, she owning three-fifths in all, and the other two-fifths by Thomas D. Clancy, by purchase. T. D. Clancy and Thomas D. Clancy are the same individual. About the year 1909 Ann Henry Clancy died intestate, leaving no heirs of her body and leaving as her heirs at law her husband, Thomas D. Clancy, and her brother and sisters, or their children. Thomas D. Clancy inherited from his deceased wife two-fifths of the real estate described in the first cause of action, except the fourth parcel thereof, in fee simple, which was an estate by purchase, and a life estate in the one-fifth which the said Ann Henry Clancy inherited from her father, Robert Henry, with the remainder to her brother and sisters, or their children.

On or about August, 1909, Thomas D. Clancy secured a quit-claim deed from one sister of his deceased wife, viz., Temperance Mellor, and soon thereafter he secured quit-claim deeds from the children of the deceased brother and sisters, which quit-claim deeds are in the usual form. These deeds recite a consideration of \$200 for Temperance Mellor, \$200 for the heirs of Julia Clark, (Jeanette Russell and H. L. Russell, her husband; Tacy A. Folk and Addison Folk, her husband; Rose V. James and L. O. James, her husband; and Julia A. Clark, unmarried), \$200 for the heirs of Robert S. Henry, a brother (James E. Henry and Eva Henry, his wife; and Anna B. Henry, unmarried), and \$200 for the heirs of Lillis Corry (R. W. Corry and Lucy Corry, his wife, and Ruth Corry, unmarried). These deeds are recorded in Morgan county deed record, Vol. 57, at page 446 and succeeding pages.

Shortly thereafter, in September, 1909, Thomas D. Clancy as guardian of the within named defendant, Patrick Henry, filed

his petition as such guardian in the probate court of this county and on October 5, 1909, procured an order from the court to sell his said ward's interest in said lands as an heir of Robert Henry, deceased, who was a brother of said Ann Henry Clancy. This undivided interest of Patrick Henry was purchased from the guardian by Charles H. Fouts and later was acquired by the said Thomas D. Clancy by deed from said Charles H. Fouts. By acquiring all these deeds the said Thomas D. Clancy became the absolute owner of the whole of the premises described in the petition. These deeds are alike in form except the guardian's deed to Fouts, and they contain no covenants or recitals. The granting clause, so called, in each is as follows: "Do hereby remise, release and forever quit-claim to the said T. D. Clancy, his heirs and assigns forever, the following real estate," etc.

Then follows a description, not of the undivided interests of the several grantors, but of the whole of the first three tracts set out and described in the alleged cross-petition of the defendants. (The third tract formerly contained 15 acres, 4½ acres of which was sold by Clancy and wife.) This is immediately followed by the customary habendum: "To have and to hold said premises with all the privileges and appurtenances thereunto belonging to the said T. D. Clancy, his heirs and assigns forever. In witness whereof," etc.

Upon this statement of facts three questions are raised:

First, was it necessary for service to be issued on the alleged cross-petition?

Second, did the quit-claim deeds made by the said Ann Henry Clancy heirs to T. D. Clancy (and guardian's deed to Fouts) bar or estop them from holding the after acquired interests, which they now claim in the undivided one-fifth part of the first three tracts described in the cross-petition, containing 116.50 acres?

Third, if entitled to share in this estate, do the claimants (nephews and nieces of Ann Henry Clancy) take *per capita* or *per stirpes*?

As to the first proposition, I think but little need be said. As stated in the outset, this is an action in partition. Not a single

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question is raised under the pleadings except this: Who are entitled to participate in the partition of these lands, and what share does each take?

The petition and amendment thereto set out the respective shares, as plaintiff, no doubt, then understood them. The cross-petition brings nothing else. True, the cross-petitioners bring in new parties, and those who have not voluntarily come into court have been properly brought in and new or different interests have been set up thereby and in part admitted by plaintiff; but has any new question arisen and been brought in by the cross-petition of which the parties already in court would not be bound to take notice?

In the familiar case of *Brown v. Kuhn*, 40 Ohio St., 468, Judge Granger, in announcing the opinion of the court at page 485, says:

“To summon those already in court would add materially to the cost of litigation without reason. The cross-petition can ask relief only ‘touching the matters in question in the petition.’ The same section that states what a defendant may set forth in his answer includes the matter of a cross-petition. Every other defendant is warned to examine the court files after the rule day for answer, for cross-petitions against himself as fully as is the plaintiff in the action.”

And again:

“So long as a cross-petition in an action is directly confined to ‘matters in question in the petition,’ the summons issued on the petition would be sufficient notice to sustain a judgment rendered on a cross-petition.” *Southward v. Jamison*, 66 Ohio St., 290.

It is therefore apparent that the issuing of summons on the cross-petition of parties already in court was unnecessary, and this notwithstanding the fact that their interests might be materially affected through the filing of the cross-petition.

Something might be said as to whether the pleading styled “cross-petition” is properly named, but it is of no consequence.

Passing to the second proposition—

Are the heirs of the blood of Ann Henry Clancy by their deeds to Thomas D. Clancy, in 1909, estopped from asserting their ownership in an undivided one-fifth of the 116.50 acres which otherwise would have descended to them as such heirs under Section 8577, General Code?

A leading Ohio case on the subject of estoppel by deed, cited by most text-writers and later authorities which I have had occasion to examine, is that of *Hart v. Gregg*, 32 Ohio St., 502. In this case Archibald Gordon, Jr., son of Archibald Gordon, Sr., who had entered the land in question, made a conveyance of the land to Hart while the father was yet alive. The son afterwards acquired the land by descent from his father and it was claimed that the deed estopped him from asserting his title.

Johnson, Chief Judge, in delivering the opinion said that that depended upon the terms of the deed. A copy of the deed is set out in the opinion. The granting clause contains the words: "Doth grant, bargain and sell unto Stephen F. Hart, his heirs and assigns forever, all his lands in Ohio," etc. This is followed by a description of the lands, and then the habendum: "To have and to hold the same forever."

The court then proceeds (p. 513):

"The question then is, would Archibald Gordon, the son, or his heirs or assigns, if defending in this action, be estopped by reason of any recitals in this deed of June 27, 1827? We think not, for it is well settled that where no estoppels arise from warranty, recital, or otherwise, a release or conveyance operates only on existing rights." (Citing *Kinsman v. Loomis*, 11 Ohio, 478.)

In this case the above rule is recognized, although the court held that the recital of facts in the deed estopped the grantors from reasserting title.

In the case at bar, there are no recitals of facts in the deeds that would make a subsequent assertion of title inconsistent therewith, as in *Garlick v. Pittsbugh & W. Ry.*, 67 Ohio St., 223.

Where the rights of third parties, innocent purchasers for value have not intervened, the intentions of the parties at the time of the conveyance ought to control, unless the language

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and expressions in the deeds are so clear and plain that they admit of but one interpretation. Could Thos. D. Clancy, or these heirs of Ann Henry Clancy have then anticipated that they might at some future time possibly inherit again through her and by these deeds intend to cut off such contingency? They must have known that the object of Thomas D. Clancy in procuring this conveyance was simply to complete and perfect his title to the whole of these lands; and he did thus have vested in himself a perfect and absolute title in fee simple with full power of *jus disponendi*. *Digby v. Digby*, 5 C.C.(N.S.), 130.

With this right and power complete in Thomas D. Clancy and the mere exercising of it sufficient to cut off all possible chance of heirship under him, the possibility would indeed be remote that any of them ever conceived such thing; and, further, it could not be true as to the defendant, Patrick Henry, who was at the time of his conveyance under guardianship with deed for his interest made under order of court.

Nor do I think the fact that each of these deeds covers the *whole* of the premises rather than the *undivided interests* actually owned by each grantor, adds much, if any strength to the claim that they must have intended these conveyances to cover any after-acquired interests. All lawyers know that it is not unusual where a conveyance by quit-claim is desired, to make the description broad enough to fully cover the claim or interest of the grantor, because it is usually treated and considered as a release only of whatever interest the grantor may have in the premises.

I have made considerable research of the authorities and have found the rule almost, if not quite universal throughout all the states, that where there are no covenants of warranty, or recital of facts such as would put the grantor claiming subsequent title in an inconsistent position with relation to the recitals, covenants or stipulations in his deed, a conveyance by quit-claim or release will never bar the grantor or those claiming under him from asserting an after-acquired title.

Quite a collection of authorities on the subject may be found in the notes to *McCall v. Hampton*, 98 Ky., 166; 8 R. C. L., Sec.

tion 113, p. 1060; 11 Am. & Eng. Encyc. of Law (2d Ed.), pp. 409 and 410.

Attention might be called to the Missouri cases cited in the notes on page 410. It appears that in that state they have a statute in which it is declared that in case a deed of an infeasible estate in fee simple is made, if the grantor did not have the legal title to the land conveyed, but afterwards acquired it, the legal estate subsequently acquired should pass to the grantee.

It has been held by the Supreme Court of Missouri in construing this legislation, that this statute does not intend that a quit-claim deed, although it uses language to pass the fee and not any smaller estate would, therefore, pass a new title not belonging to the grantor when he makes the deed. (See cases there cited.)

The conclusion reached by the court obviously follows that the heirs of the blood of Ann Henry Clancy take by inheritance under Section 8577, General Code, the undivided one-fifth of the 116.50 acres.

The third and remaining question is, do the heirs of the blood of Ann Henry Clancy, all being of the same degree of consanguinity to-wit, nephews and nieces, take *per capita* under Section 8581, General Code, or *per stirpes* under Section 8582?

It is not necessary to take much time to discuss this question, as all those who are directly represented by counsel (and from the answer they *all* seem to be so represented) are claiming to take *per stirpes*. The plaintiff alone insists that they share equally in the one-fifth, if at all, and in whatever proportion they may be seized can not affect his rights.

Plaintiff claims that they take as the heirs of Ann Henry Clancy. But that can not be, for she has no estate here to be divided. Her estate was inherited by her husband, Thomas D. Clancy, or, putting it in a different form, the statute placed him in the line of descent and cast her estate upon him. If these heirs of her blood would inherit from Ann Henry Clancy, then an administrator of her estate is necessary and he is the only person who could make legal distribution.

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Prior to the year 1877, these heirs would not have inherited any of Thomas D. Clancy's estate (74 O. L., 81); it would all have descended to his own blood, even though two-fifths of it came by purchase to Ann Henry Clancy, his wife. Summers, J., in *Stockton v. Frazier*, 81 Ohio St., 227, 233, says:

"The supplementary act of 1877 * * * was enacted to remove the apparent or supposed hardship resulting from the statute as so interpreted."

It was, therefore, by virtue of this statute that the line of descent was changed. It is sometimes rather difficult to get away from the notion that the line of descent must always be fortified by the blood of the ancestor.

"Descent is where the title is vested in a man by the single operation of law." 2 Black. Comm., 201.

"Descent, or hereditary possession, is the title whereby a person on the death of his ancestor acquires his estate by right of representation as his heir." 4 Kent's Comm., 373.

There can be no other title aside from descent except by purchase. There can be no title by descent except there be an ancestor. There can be no one to take from an ancestor except he be an heir. The heir may be in the channel of the blood of his ancestor, as the statute in justice usually directs it; or he may be a person selected by the law, as in this case, and may be the receptacle whose blood is entirely foreign to that of the ancestor; but one takes by descent just the same as the other.

There can not in this estate, nor any other, be two ancestors. The ancestor in this estate must be Thomas D. Clancy. One set of heirs trace their title under the laws of consanguinity directly to the ancestor. The other set trace theirs back by the same law to a designated deceased person (wife of Clancy), but would never by reason of the blood be seized of any part of the estate. So Ann Clancy can not be the ancestor in this estate from whom they may inherit; but the statute bridges over the hiatus in the blood and places them in the line of descent from Thomas D. Clancy.

It is just as important, of course, that the blood be traced back to Ann Henry Clancy by the one set of heirs as it is that the other heirs trace theirs back to Thomas D. Clancy.

Thomas D. Clancy, then, is the common ancestor, and in that relation, must the interests of each and all the heirs be considered in determining their distributive shares.

Section 8581, General Code, is as follows:

“When all the descendants of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate, whether children, grandchildren, or great-grandchildren, or of a more remote degree of consanguinity to such intestate, the estate shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be.” (Section 4165, Revised Statutes.)

Two very important conditions must prevail in order that the heirs may inherit equally under this section.

First, *all* of the descendants must be in a direct line of descent from the intestate whose estate is being distributed, as from father to son, son to grandson, etc.

Second, all must be of an equal degree of consanguinity to the intestate.

In this case neither of these conditions exists. None of the descendants is in direct line of descent. All are collateral and all are not of an equal degree of consanguinity.

Section 8582, General Code, provides:

“If some of the children of such intestate are living, and others are dead, the estate shall descend to the children who are living, and to the legal representatives of such as are dead, so that each child of the intestate who is living will inherit the share to which he or she would have been entitled if all the children of the intestate were living, and the legal representatives of the deceased child or children of the intestate inherit equal parts of that portion of the estate to which such deceased child or children would be entitled if such deceased child or children were living.” (Section 4166, Revised Statutes.)

Section 8583 defines and enlarges the provisions of Section 8582 as follows:

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“The provisions of the next preceding section shall apply in all cases in which the descendants of the intestate, entitled to share in the estate, are of unequal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity, will take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living.” (Section 4167, Revised Statutes.)

Clearly, this case must fall under the last two sections above named. The decision of the Supreme Court of *Dutoit v. Doyle*, 16 Ohio St., 400, and approved by *Parsons v. Parsons*, 52 Ohio St., 470-485, but follows and recognizes the common law rule and the statutory provisions under Sections 8582 and 8583, General Code. The language of these statutes as applicable to this case is plain and unequivocal.

The 116.50 acres of this estate must, therefore, be distributed in accordance with these two last named sections.

I believe the shares are correctly set out in the cross-petition of defendants and no further calculation will be necessary.

As to the coal underlying the 80 acres in Meigsville township, and the 8.50-acre tract in Windsor township, described in the pleadings, I understand there is no dispute.

The blood relatives of Thomas D. Clancy take three-fourths, and those of Ann Henry Clancy take the remaining one-fourth.

An order of partition will be granted plaintiff.

VALIDITY OF THE APPOINTMENT OF A POLICEMAN.

Common Pleas Court of Jefferson County.

LOUIS DEROMEDIS ET AL V. THE INCORPORATED VILLAGE OF
YORKVILLE, OHIO, ET AL.

Decided, November 30, 1918.

*Municipal Corporations—Procedure Rendering Valid the Appointment
of a Policeman—He is a Public Officer—And Must be an Elector of
the Municipality He Serves.*

1. In order to render valid the appointment of a policeman, the office must be created and the salary fixed by council, the mayor then appointing and council confirming the appointment.
2. A policeman is a public officer and must therefore be an elector of the municipality from which he receives his appointment and derives his authority.

Cohen & Rodgers, for plaintiff.

Thomas S. Jones, contra.

SMITH, J.

On May 8 the council of the village of Yorkville hired James Parkinson as policeman. The record of this action is recorded in its minutes as follows:

“Minutes of meeting held May 8, 1918. Council met in special session. Roll call. Present, Bayer, Evans, Tolbert, Nunley; absent, Brooks, Kirkbride. Motion by Evans, seconded by Nunley, that James Parkinson be hired as police for the village of Yorkville at a salary of \$135 per month straight time, to be in uniform—uniform to be furnished by Mr. Parkinson. On motion, council adjourned.”

On the 4th day of October, 1918, the plaintiffs as tax-payers of Yorkville secured a temporary injunction against the defendants from paying Parkinson's salary. It is averred in the amended petition that this alleged appointment is illegal, and

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inson for the reason that he is not a resident or citizen of Yorkville but resides in the city of Steubenville. This fact is admitted.

First, was the action of council on May 8 within its corporate powers? A municipality is a creature of law. It derives its powers and privileges solely from legislative enactment. Furthermore that said council is without authority to hire Mr. Park-
eral Code, Section 4384, provides for the election and qualification of a marshal and for the appointment of deputy marshals and policemen:

“The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special police-
ment, and may remove them for cause, which shall be stated in writing to council.”

Section 4385 defines the general powers of police officers. Under the provisions of these two sections council has the right to provide for the employment and appointment of police officers. These sections determine the only method by which these policemen receive their appointment.

Council must first by appropriate legislation create the offices of policemen or deputy marshals and fix their salaries and terms of office. After the offices are created the mayor may then appoint the deputies or policemen and this action must be confirmed by council. From the minutes of council it appears that it hired James Parkinson as a policeman for the village at a salary of \$135 per month, straight time. This is clearly beyond its power. It has the right only to create this office. The mayor must then appoint and the council must confirm that appointment as provided in Section 4384. It follows, therefore, that this action of council in its attempt to employ Parkinson as police officer without having first created the office and fixed its salary was beyond its authority. The right to appoint vests in the mayor, subject to the subsequent confirmation by council.

Must a policeman be an elector of the municipality from which he receives his appointment? General Code, Section 4666, provides that:

"Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise provided." * * *

If a policeman is an officer it follows that he must be an elector. It is difficult to define the term officer. Each case should be decided on its peculiar facts and involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created.

Judge Spear in the case of *State v. Hunt*, 84 O. S., 149, in his opinion recognizes this difficulty and says:

"We have not undertaken to enter the field of definition of office or officer. As given in the books they are multitudinous not to say multifarious. In deed so varied are they scattered through the books that the ingenious barrister may find support to almost any proposition relating to the general subject, which the necessities of his case may seem to demand. But like maxims of the law when used indiscriminately and without judgment, they are apt to mislead. One which seems to have met with most favor perhaps is that an office is a public position to which a portion of the state sovereignty of the country attaches, and which is exercised for the benefit of the public."

The Supreme Court in the case of *State, ex rel, v. Brennan*, 49 O. S., 33, quoted in *State, ex rel, v. Jennings*, 57 O. S., 426, says:

"It is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation of title, the position so created is a public office."

Throughout the opinion in the case of *State, ex rel, v. Brennan* prominence is given to the fact that a public officer is one who

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exercises in an independent capacity a public function in the interest of the people by virtue of law, which is only saying in another form that he exercises a portion of the sovereignty of the people delegated to him by law.

Applying what has been said to the instant case it clearly appears that a policeman regularly employed by proper legislation, appointed by the mayor and confirmed by council as provided for in Sections 4384 and 4385 is a public officer. Does he not exercise a portion of the sovereignty of the people delegated to him by law? He has public duties to perform. He is charged with the duty of preserving public and private property and protecting the people's interests. He has authority to make arrests on view. He has the right to go outside of his municipality and make arrests throughout the state. He not only has this authority but is charged with this duty, and upon the acceptance of his office he takes an oath to this effect and gives bond for the faithful discharge of these duties. He is clothed with functions to be exercised in the interests of the people. His services are compensated by a stated yearly salary. He is designated as a policeman.

When we look for precedents to determine this question we find various opinions in different states as to whether or not a policeman is an officer. A close analysis of these cases, however, discloses that the statutes in the different states and under the different constitutions contain various limitations and prescribe different duties.

In our own state it has been held that the chief of police is a public officer (8 C.C.[N.S.], 293; 25 O.C.C., 762). Also, that the chief of the fire department is a public officer (20 C.C.[N.S.], 478), and that a member of the municipal board of health is an officer of the municipality (*State, ex rel Wind, v. Wichgar*, 27 O.C.C., 743). It is held in the cases cited that the chief of police and chief of the fire department are clothed with public functions and vested with a portion of the sovereignty of the people. The same principle applies with equal force to a policeman in a village.

It is uniformly held that a policeman is not only a municipal officer but a state officer as well. I call attention to the notes in

the Lawyers Reports Annotated, Volume, 36, at page 881, where the author says:

“The principal duty of a police officer, viz., the preservation of public peace, is a matter of public concern; and therefore policemen are state or public officers, and not municipal or private officers. They are appointed under authority given by the state, and therefore they are not to be regarded as agents or servants, or as otherwise bearing merely a contractual relation to the municipality.”

This proposition is supported by numerous authorities. To the same effect is Dillon on Municipal Corporations, Sections 390:

“The office of a police officer is not known to the common law; it is created by statute, and such an officer has, and can exercise, only such powers as he is authorized to do by the Legislature, expressly or derivatively. He is an officer of the state rather than of the municipality in which he exercises his office.”

The same doctrine is recognized by Judge Howland in the case of *Alvord, Admr., v. Village of Richmond*, 3 N. P., 136.

It follows, therefore that a policeman is a public officer and under the provisions of Section 4666 he should and must be an elector of the municipality from which he receives his appointment and derives his authority. For these reasons the injunction in this case is made perpetual.

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Converse v. Panhard Motors Co.

PLEADING UNDER THE CODE.

Common Pleas Court of Franklin County.

P. D. CONVERSE V. PANHARD MOTORS COMPANY.

Decided, December 20, 1918.

Pleading—Requirements of the Code—Useless Repetition in the Making of Denials—Facts Should be Stated Concisely and in Ordinary Language—Unnecessary Labor Thrown Upon the Court by Slovenly Pleading.

1. The only pleas authorized by the Code for employment by the defendant are the general or specific denials and of new matter. A denial of each and every allegation not admitted or denied is unauthorized by the code.
2. The rule requiring facts to be stated without repetition applies to pleadings of both parties, and forbids the repetition of facts alleged in a petition by allegations of admissions thereof by defendant. Such repetition of facts also violates the rule which requires facts to be stated in ordinary language, which contemplates this be done in the established order and methodically.
3. Ordinary language is the use of such English words as are used in strict requirement of the rules prescribed by the Code. Compliance with the rule of ordinary language requires the facts shall be stated in concise and condensed form, and forbids useless repetition by methods not authorized.

KINKEAD, J.

Counsel for plaintiff contends by his motion that there are defenses in the answer contained that are not separately stated and numbered.

There are three alleged defenses which are separately numbered. In the first one there are three or more paragraphs of mere admissions. It has long been common practice to lumber up pleadings with long pages of admissions which are unauthorized improper, and accomplish nothing but to increase the costs.

These admissions are found throughout the pleading. The pleading also contains the common unauthorized form of denial

of all allegations not specifically denied or admitted. Such admissions or denials do not aid the court in performing its duty in stating the issues. The court has to ferret out the controverted facts, and the illegitimate denial and unauthorized form of denial does not help. Only the slovenly trial judge notices them, according to Pomeroy's Code Remedies. The statement of the issues to a jury by reading the pleadings *verbatim ad literatim* is not always the best way of placing the facts in issue before it.

The last paragraph in the answer immediately preceding the cross-petition is another useless appendage to a pleading. It is what we have often characterized as an illegitimate form of denial, that is, one not authorized by the code—a denial of all facts not admitted or denied.

The tools provided by the code are special denials, general denials, and new matter constituting defense or counter-claim. A special denial is a most efficient weapon; the more there are the more efficient is the pleading.

The answer and cross-petition is an unnecessarily lengthy pleading and it is somewhat complicated.

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 should all be omitted because they are mere admissions.

The first paragraph of the second defense should be omitted; also the second paragraph.

The first paragraph of the third defense should be omitted. So far as it is attempted to incorporate and repeat these useless admissions into subsequent defenses it is wholly unwarranted and improper. No rule is better settled nor better understood than that one complete or whole defense can not properly be incorporated into another one. Each defense is a separate, distinct entity and must stand alone. Of course where certain allegations may be common to other defenses such particular parts may be properly incorporated by apt words of reference. But in this case all that is found under the head of a so-called defense from "the first line and ending with the * * * line, etc." is sought to be incorporated into another defense. This can not be done, because the matter sought to be incorporated is irrelevant and improper.

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Paragraphs 1 and 2 in the third defense should be omitted.

The use of words, "further answering the defendant" could be well omitted where there are so many repetitions. Their omission will also avoid useless repetitions and will tend to conciseness and better statement.

The last paragraph in the third defense should be stricken out

"Further answering defendant denies each and every allegation not hereinbefore specifically admitted to be true."

No such form of allegation is permissible; it is not authorized, although it is perhaps found in every pleading filed in court. But such practice is precisely like the abuses under the common law which brought about the Code.

As long ago as 1895, in the March number of the *American Lawyer*, appeared a statement by a member of a committee making a report by the American Bar Association that code practice, as then carried on, had abandoned its simplicity, and is losing its distinctive character, and unless return is made to first principles it will in a short time be subject to all the criticisms made on its predecessor, the common law with but few of its redeeming features."

The observation of the judiciary is that proper care is frequently not observed in following the simple rules of the Code. The rules of common law and code pleading are kindred in many respects, the changes in procedure made by the code being designed to obviate the evils grown up under the old system. The tools provided by the code, that is the pleadings, and the pleas, are unlike those of the common law; these are the instrumentalities that are so often misused.

The facts are to be stated in ordinary and concise language *without repetition*. We do not think this pleading complies with that rule.

Many pleadings are encountered which consume from one to three or more pages of admissions, which practice is not warranted. The experience of stating the precise questions at issue to a jury presents a different viewpoint. The attitude of the lawyer in preparing the pleading is that of fear that he will

admit something by failing to deny. Hence the form of "illegitimate denial" of such and every allegation not herein admitted or denied is universally adopted. It is neither a special nor general denial; hence it is plainly unauthorized and improper.

If a party can not properly deny all the allegations, but wishes only to deny certain averments, the special denial should be adopted. As a matter of fact the special denial properly used is more efficient than the common unwarranted practice of admitting certain allegations denying others, then closing with a denial of each and every allegation not hereinbefore admitted or denied.

One of the most important duties of a trial judge in jury cases is the statement of the issues. He can do it more efficiently when the provisions of the code are followed:

Facts are to be stated without repetition; that means not only that each pleader must not repeat facts contained in his pleading, but it also contemplates that the adversary shall not take up each fact which can not be denied, and repeat the same in his pleading, thus encumbering the record with a double statement of the facts, increasing the costs and violating the plain injunction of the Code requiring facts to be stated in ordinary and concise language. Such repetition of the same words as is done by an adversary in the form of repetition by way of admissions, violates the express language of the code; it is not expressing the claims of parties in a few words; the statement is not condensed, brief and compact; it is not the concise style required by the Code.

Neither is such statement made in *ordinary* language as required by the Code; ordinary language by the dictionary is according to the established order; methodical, common, customary, usual. But as an English jurist stated in *Houghton v. Gilbert*, 7 C. & P., 701, a general dictionary of the English language is not to be considered an authority to show the meaning of a word. So if the latter part of Webster's definition above quoted were to be adopted we would be forced to conclude that the method pursued in this case was proper; because indeed it is "common,

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customary and usual" among all the members of the bar, as evidenced by all the pleadings filed in court, to violate certain rules. However, the course pursued is not according to the established order fixed by the Code.

Judge Swan's conception of the requirement—ordinary language—was the "use of such English words as are commonly used among intelligent men in the statement of facts." This view may seem to be against the writer's contention, because the practice here condemned is common among the intelligent members of the Bar. The requirement of ordinary language, however, if qualified by the rule that it shall be concise; it can not be concise or condensed if there is useless repetition by methods not authorized by the forms of statement by a defendant.

For instance, defendant is a foreign corporation; hence (unlike a domestic corporation) its corporate capacity must be alleged. But defendant is not justified in making the admission of corporate capacity; it is neither new matter, nor a denial. In the first defense, defendant makes an allegation of admission in the first paragraph consuming nearly two pages which, if material, are admitted if they are not specifically denied. This is the rule of the Code; that which is not denied, is by law admitted, then why take all allegations not denied and admit them by repeating the averments of the adversary.

It is not surprising that a motion to separately state and number defenses was made in this case, because the pleading is confusing and without close careful study one might think there were several separate defenses contained in each of the defenses as designated by numbers, whereas as there is not.

The first cause of action of the cross-petition seeks to recover \$2,304.67 against plaintiff on alleged account for one Panhard Truck Model A 7c, a copy of which it is stated is attached to the cross-petition. No such alleged account is attached and it is doubtful if it would be proper to do so for the reason that it purports to be a single transaction of sale.

The second cause of action adopts all that part of the first cause of action between the "first line on page — and ending with etc."

Such an attempted adoption is improper. It does not enter into the second cause.

In the second cause of action of the cross-petition it is alleged that the parties entered into a contract in writing with the Hamilton Motors Co. agreeing to purchase certain trucks etc., which was assigned to plaintiff. Failure to complete the contract is alleged, the cross-petitioner claiming damages for such alleged breach.

Plaintiff moves to require a copy of such contract to be attached to the cross-petition. Such motion ought not to have been made, nor the time of the court taken with it, because it certainly must be understood that where a claim for damages is made, on account of breach of written contract, such contract is in no sense to be considered an evidence of indebtedness which the statute required to be attached to the pleading.

This branch of the motion is overruled. The first and second branches of the motion are sustained by the order which the court indicates in this written decision. That is: To omit paragraphs 1, 2, 3, 4, 5, 6, 7, 8, of the first cause of action these paragraphs appearing to be mere admissions of allegations contained in the petition; also omit paragraph 1 and 2 in second defense; also omit paragraphs 1 and 2 in third defense; also omit the last paragraph of the fourth defense which is an unauthorized form of denial.

If counsel finds any material allegation which should be denied, use the proper tool of the Code, viz; special denial. A denial of each and every allegation not hereinbefore specifically admitted to be true, is not only slovenly (but everybody uses it) but it is unauthorized and constitutes so many useless words in a pleading which ought never to be noticed by any trial judge. See *Pomeroy's Code Rem.*, Section 525; *Bakas v. Casparis Stone Co.*, 14 N.P.(N.S.), 577.

The order made upon the motion to the answer is that the same be amended according to the suggestions of the decision.

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Hewston v. Byrnes.

BOY INJURED WITH CAPS USED IN EXPLODING DYNAMITE.

Common Pleas Court of Hamilton County.

DANA K. HEWSTON, A MINOR, v. JOSEPH A. BYRNES.

Decided, February 3, 1919.

*Negligence—In Leaving Percussion Caps Where Accessible to Boys—
Jury at Liberty to Say that in a Given Case Circumstantial Evi-
dence Outweighs that Which is Direct and Positive.*

1. One who leaves percussion caps of a highly explosive nature in a place where children of tender years are accustomed or likely to resort is guilty of negligence and liable for any injury resulting to a child who takes said caps and causes them to explode.
2. The rule that circumstantial evidence can not prevail against that which is direct and positive is only applicable where there is no doubt of the truth of the direct and positive evidence, but the truth of the direct and positive evidence is a question for the jury and a verdict will not be set aside for the reason that the jury rejected the direct and positive evidence and found a verdict based upon the circumstantial evidence where no passion or prejudice is manifest in the finding and verdict of the jury.

Sanford A. Headley and Frank E. Wood for the motion.

Thos. L. Michie and W. W. Clippinger, contra.

GEOGHEGAN, J.

Opinion on motion for a new trial.

The plaintiff, at the time of this accident, was a boy about nine years of age. He lived in a little town called Ramona, in this county, with his parents. His father, by an arrangement with W. W. Clippinger, pastured a cow in Mr. Clippinger's field. It was the boy's duty to go into this field and drive the cow home every evening and after the cow was milked drive her back again into the field. On or about the 21st day of October, the boy, accompanied by another boy of the neighborhood, went into the field, as was his custom. While passing through the

field, the boys picked up some percussion caps, which are used for the purpose of exploding charges of dynamite. This boy kept the caps about the house and a few days later, while his mother was absent from the kitchen, the boy put some of the caps in the fire, with the result that they exploded, causing him to be burned severely, to lose the sight of his left eye, and causing a permanent injury to the fingers of his left hand.

The defendant, Joseph A. Byrnes, was, at that time, engaged as a public contractor in the construction of a road at this village of Ramona. He was using a number of men and teams upon the job, and during the progress of the work it was necessary for him to do some blasting. This blasting was in charge of one Richardson, who was employed by him on the work, and in that operation percussion caps were used in order to explode the charges of dynamite used in the blasting. These are the undisputed facts in the case.

The plaintiff brought his action upon the theory that it was negligent for the defendant, Byrnes, through his agents and servants, to leave exposed in a place where children were in the habit of going a dangerous agency, to-wit, the percussion caps, and offered evidence of the foregoing circumstances in support of his theory. He also offered in evidence a certain tin box, which was painted a color bordering on red, and offered evidence tending to show that this box had been found in the field a short distance from where the boy had picked up the caps. This box had been found originally by the plaintiff's companion and had been thrown away.

The defendant offered evidence to show that while he had purchased caps similar to those found by the plaintiff, the caps that he had purchased were not of the same manufacture as those found by the boy; that the box containing the caps which he used on this work was a different box from the one offered in evidence, being painted black; that he had purchased the box from one Garber, on March 22, 1916, had delivered the box to his foreman, Dodds, who was in charge of some work for him in Avondale; that Dodds had given part of this box to one Tanner,

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another contractor, before the work was started at Ramona; that while at Ramona the caps remaining were in the custody of Dodds; that they were used two days and each time were returned to him; that they never were on the field of Clippinger, but at all times were on the right-of-way, that is, upon that portion of land upon which the road was being constructed. And the defendant seeks to have the verdict which was rendered herein set aside on the ground that it is against the weight of the evidence.

The court, in submitting this case to the jury, charged especially that if the jury were not convinced, by a preponderance of the evidence, that the caps found by the boy were caps that belonging to Byrnes, there should be a verdict for the defendant. So that, substantially, the whole case hinged upon the question as to whether or not the caps found were caps that belonged to Byrnes.

No evidence was offered that any other construction work in which blasting was necessary was being done at that time, or had been done for a long time prior thereto, at or near the place where this road was being constructed. But the testimony is clear that Byrnes had established a camp in Mr. Clippinger's field, and that his employees were in the field and lived in that camp, at least during the major part of the construction of the work, and that Richardson was in and about the field and lived there while the work of building the road was in progress.

Counsel for the defendant contend that the evidence of plaintiff, being circumstantial in its nature, must succumb to the evidence of the defendant, which is of a direct and positive character, and cite some authorities to the effect that where a case is built up upon circumstantial evidence, it can not prevail against a defense in which the evidence is of a direct and positive character.

The fallacy in the argument of counsel for defendant is this—that he assumes that the case of plaintiff is entirely a case built up upon circumstantial evidence. This is not quite the fact. There is direct evidence that Byrnes used caps in blasting; that

the caps found by the boy were similar in character to the caps which Byrnes conceded he used on the job. There is direct evidence that Byrnes' servants were in this field and that the caps were found near the tool box which was in the field during the time that Byrnes was doing the work on the road. There is direct evidence that there was no other work of a similar character being done in the neighborhood. A jury, in the absence of any evidence to the contrary, had a right to infer that these caps were the property of Byrnes and had been carelessly left by him or his servants in the open field.

The real point of difference in the case is the question as to ownership of the particular caps in question, and this is the defendant attempts to meet by showing that the blasting caps which he used on the job did not come in the same kind of box as the one found by the boys and that after the work was finished his foreman carried away all the unused caps from the job and they were subsequently disposed of by being thrown into a sewer.

It would be difficult to say, under the circumstances of this case, that the verdict is against the weight of the evidence. The jury might have very well believed the evidence offered by the plaintiff, and have drawn therefrom the inference referred to above, and they may have disbelieved the evidence offered by the defendant, especially in view of the fact that, as in all evidence, there were certain contradictions therein, notably the testimony of the defendant and of Dodds, in which they positively stated that they received the box of caps that were used upon the Ramona job and at Avondale on the 14th of March, whereas the bill for the same and the evidence of the agent of the person from whom the caps were bought showed that they were not purchased until the 22d day of March, of the same year.

While it is true that a case built up entirely upon circumstantial evidence can not prevail as against a case where the evidence is positive and direct, where there is no doubt of the truth of the positive and direct evidence, nevertheless, it is entirely within the province of the jury to weigh and sift the con-

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flicting evidence and to disbelieve that which they think ought not to be believed.

Now it is evident in this case that the jury disbelieved the evidence as to the kind of caps that the defendant claimed to have used on the job, and, therefore, having nothing left but the evidence of the plaintiff, they rightfully drew the inference that the caps had been negligently left in the field by the servants of the defendant. Therefore, believing this, it follows as a necessary conclusion that Byrnes would be responsible for any injury occurring to the boy by reason of the explosion of said caps, if the boy were not guilty of contributory negligence on his part. *Travell v. Bannerman*, 174 N. Y., 47.

The question as to the boy's contributory negligence was properly submitted to the jury, and no complaint is made as to the court's charge in that respect, nor did counsel for defendant touch upon same either in his oral argument or in his brief.

A careful examination of the evidence, therefore, does not disclose that the verdict of the jury herein was manifestly against its weight. There is direct contradiction in the evidence, it is true, but not more so than is usually found in cases of this character. The case was properly submitted to the jury and their verdict should stand unless manifestly against the weight of the evidence, and this I am unable to determine after a careful review of same.

The motion for a new trial will therefore be overruled.

**ACTIONS IN TORT AGAINST GOVERNMENT CONTROLLED
RAILWAYS.**

Superior Court of Cincinnati.

CHARLES C. OYLER ET AL V. THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAILWAY.

Decided, February 6, 1919.

Proper Party Defendant—In an Action Against a Government Controlled Railway—For Recovery of Damages Due to Negligence—Legal Status of the Companies and of the Director General.

1. While suits in equity may still be maintained for and against railway companies under Federal control, upon causes of action involving the companies themselves, actions against such roads in their capacity as common carriers are properly brought against the Director General for the reason that they are no longer operating companies, their duties and obligations as common carriers having been transferred to the Director General.
2. The question of right to maintain an action against the sovereign, for negligence in the performance of governmental duties and in the absence of a statute expressly authorizing such action, is not raised for the reason that the Director General has, by a general order, proclaimed his willingness to submit to the jurisdiction of the courts in matters connected with the operation of the railways under his control.

Harmon, Colston, Goldsmith & Hoadly, for the motion.

H. G. Hightower, contra.

HICKENLOOPER, J.

Heard upon motion to substitute Wm. G. McAdoo, Director General of Railroads, as defendant.

This cause comes up for hearing on two motions, one by Wm. G. McAdoo, Director General of Railroads, and the other by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, both moving that Wm. G. McAdoo, Director General

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of Railroads, be substituted as defendant in this action. The cause of action stated in the petition is for the conversion or wrongful sale of certain oranges, on or about January 15, 1918, while the same were in transit from Cincinnati to Chicago.

Section 1 of the act approved August 29, 1916, entitled "An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 30, 1917, and for Other Purposes," provides that "the President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purpose connected with the emergency as may be needful or desirable." A state of war having been declared by the Congress of the United States to exist between the United States and the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, the President of the United States, through the Secretary of War, issued a proclamation on the 26th day of December, 1917, declaring that he took possession and assumed control at 12 o'clock noon on the 28th day of December, 1917, of all railways and systems of transportation.

Some question having arisen as to the extent of the presidential authority in this connection and the legality of Federal control of railways, the Congress of the United States on March 21, 1918, passed the act entitled "An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes." This act of Congress differs in some material respects from the presidential proclamation by which federal control was assumed. The presidential proclamation provided that:

"Said director may perform the duties imposed on him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employees of said

systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies * * * but suits may be brought by and against said carriers and judgment rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine."

The act of March 21, 1918, however, while omitting the provision as to the retention of control by the boards of directors and the operation of the roads by them, unless and except as the Director General should by general or special orders otherwise provide does provide "that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Action at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; * * *." Apparently assuming to act under the terms of the presidential proclamation above quoted, the Director General of Railroads did, on October 28, 1918, issue General Order No. 50 by which it is ordered "that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against Wm. G. McAdoo, Director General of Railroads, and not otherwise."

In both the presidential proclamation and the act of March 21, 1918, language is used emphasizing the fact that the con-

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trol assumed is the actual control of operation and that such operation is the act of the Director General and not, therefore, the act of the company. As above noted, the President in his proclamation assumed to "take possession and assume control" of the transportation systems and the preamble of Section 1 of the act of March 21, 1918, is "that the President, having in time of war taken over the possession, use, control and operation of certain railroads and systems of transportation, is hereby authorized to agree," etc. Further, under the act of March 21, 1918, all monies and other property derived from the operation of the carriers during federal control are expressly declared the property of the United States and the transportation systems are spoken of as "being operated under a unified and co-ordinated national control and not in competition."

A careful consideration of the various provisions of these acts and the general orders of the Director General of Railroads leads the court to the conclusion that while actions at law and suits in equity may be brought by or against such carriers, and judgments rendered as then provided by law, upon any cause of action existing as against the companies themselves, such companies have not been "operating companies" since federal control went into effect and the provision of the act of March 21, 1918, that carriers under federal control shall be subject to all laws and liabilities as common carriers is entirely inconsistent with the act of federal operation and therefor wholly without effect. The duties and obligations of the common carrier have, since that time, been the duties and obligations of the Director General of Railroads, and the acts or negligence, if any, have been the acts and negligence of such Director General. The companies have not lost their character of legal entities nor the power to sue and be sued, but their freedom from liability in an action for injury to person or property, or the wrongful conversion thereof is due to the fact that such companies are, legally, liable only for their own acts and not for the acts of the operating power over which they have no direct control. Nor do we think that the fact that this cause of action arose before the Federal Railroad Administra-

tion was fully organized but while the Director General of Railroads was exercising his powers through the boards of directors and officers of the various railroads, in any way changes the fact that the acts of operation were the acts of the Director General of Railroads and not of the companies. The Director General was simply exercising his powers through the agency of the individuals who had theretofore comprised the officers and boards of the companies.

An interesting question might be presented as to the right to maintain an action against the sovereign for negligence in the performance of governmental duties where no statute expressly authorizes such action; but, inasmuch as the Director General of Railroads has, by General Order No. 50, expressly stated his willingness to submit himself to the jurisdiction of the courts in such matters, and he is present in court now asking that he be substituted as defendant in this case, it would seem unnecessary for the court *sua sponte* to raise this question. It is sufficient to say that, in our opinion, the acts complained of are the acts of the Director General of Railroads, and that he is entitled, upon his own motion, to be substituted as party defendant. An entry may be drawn making such substitution.

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Doerfler v. State Taxing Commission.

ASSESSMENT OF BANK SHARES FOR TAXATION.

Common Pleas Court of Cuyahoga County.

SAMUEL DOERFLER V. STATE TAX COMMISSION ET AL.

Decided, December 16, 1918.

Taxation—Limitation on the Power of the State to Raise Revenue by—Bank Shares Not Taxable at Market Value—Franchise and Good Will Not Taxable as Property—Revision of Tax Valuation Proceedings.

1. The capital stock of banks is improperly assessed for taxation according to the market value of the shares, subject as they are to speculative fluctuations and intangible values.
2. The corporate franchise or good will of a bank can not be regarded as property for purposes of taxation.
3. Article XII of the state Constitution is a limitation upon rather than a delegation of power to raise revenue by taxation.
4. The term "revision" as used in the title of act 107 O. L., 551, providing for revision of the orders of tax commissioners, does not require courts of record, in the absence of records filed with petitions in error, to perform the ministerial duties of an assessing board.

FORAN, J.

This case comes into this court under favor of an act of the General Assembly, passed March 21, 1917, and strange as it may seem, approved by the governor as passed; 107 O. L., 551. The title of the act, which the Constitution (Article II, Section 16) provides shall be clearly expressed in its title, is as follows:

"To supplement Section 5611 of the General Code, by the enactment of Sections 5611-1 and 5611-2 providing for the revision by the *Supreme Court* of the orders of the Tax Commission of Ohio relating to the valuation of property for taxation."

By the word "revision" is undoubtedly meant that the Supreme Court was to be empowered to review the order of the State Tax Commission. Review, as a legal term, means to examine again and revise, as an appellate court reviews a decision

or judgment of an inferior court, or as a superior court reviews the decision or judgment of an inferior court; and the conclusion of the superior court on review is the revision of the thing reviewed. Or, to state it differently, the revision is the completed act of the reviewing court. Looking into the act itself and the language employed or used to express the legislative intent, we obtain a vague hint for this confusing and inept misuse of words. By Section 2 of the act (Section 5611-2, G. C.) it is provided that the proceedings to obtain a *review* or modification of the order of the tax commission "shall be by petition in error filed in the court of common pleas," but it is further provided in the same section that, in addition to the certified transcript of its final order, which the tax commission is required to deliver to the person filing the petition in error, the court in which it is filed "may call witnesses and consider other evidence in addition to such transcript in the hearing on such petition in error."

Very naturally, the question is presented whether the proceeding now before the court is on appeal or in error. Manifestly it can not be both, as the two proceedings are clearly inconsistent. A petition in error is a new action to reverse the judgment below, but an appeal is in the circuit (Ohio) court the same action as in the lower court or court of common pleas. *Foster v. Barnes*, 63 Ohio St., 169, 172. An appeal is a proceeding in the original case, which continues the case by suspending the decree of the lower court until final hearing in the appellate court. *Teaff v. Hewitt*, 1 Ohio St., 511.

However, this anomalous incongruity occasions no surprise, as consistency is rarely, if ever, found in the intellectual jewel casket of the modern state legislator; and yet there may be some excuse for the bewildering chaos of the legislative mind.

As the law existed in 1916, when this cause of action, if it may be so called, arose, the tax commission had power to increase or decrease the value of banks' shares in order to establish equality and uniformity, as returned and fixed by the county auditor under favor of Section 5412, G. C. As the conclusion or determination of the tax commission was final, it

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was deemed advisable to provide for a review of some kind if the order of the commission resulted in inequality or injustice to the state or to the banks. How was this to be done? If the courts were given appellate jurisdiction, they would be required to perform duties in no respect judicial. As has been pointed out, by appeal in law we mean that the decision of a lower court is referred or taken to a higher court for re-examination or hearing upon the merits *de novo*. To require a court to determine the valuation of property for purposes of taxation would be conferring upon the court mere ministerial functions to perform acts prescribed by law without dependence in any way upon judicial discretion as to the propriety of the conclusions reached; thus, in effect, conferring upon judges the duties of assessors or other tax officers.

To avoid a situation so obviously incongruous, the proceeding to review or modify the orders of the tax commission is called a proceeding in error, or a proceeding instituted by filing a petition in error, that is, in the instant case, a proceeding to review mistakes or errors of law by the tax commission, in wrongfully applying or interpreting or construing the statutes relating to taxation. But here a seemingly insuperable difficulty arose. As the law stood in 1916 (Section 5619, G. C.), the tax commission could increase or decrease the value of shares as fixed by the auditor, and under favor of Section 5623, G. C., its orders are final or binding, and while it could consult the Attorney-General and prescribe uniform rules respecting the mode or manner of exercising the powers conferred upon it, still, as these powers are far-reaching, a suspicion prevailed in 1916, and still prevails, that the tax commission may, in large measure, become a star chamber tribunal and receive information it need not necessarily make part of its public records.

This is quite evident from the certified transcript now before the court. This transcript does not contain a particle of evidence or give a single reason why it reduced the value fixed by the county auditor on the shares of one of the defendants in error; that is, "the value of the shares and property representing capital employed by The Union National Bank." For these

reasons it was deemed necessary, and, in the opinion of the General Assembly, essential, to go behind the mere finding and order of the tax commission, and to this end the common pleas court "may call witnesses and consider other evidence in addition to the transcript in the hearing of *such petition in error*."

It may be said, in passing, that without such additional evidence in the case now before the court, the plain duty of the court, if it had to pass upon the issue presented by the transcript alone, would be to dismiss the petition in error. Hence the case is squarely before the court on appeal under a statute providing for a proceeding in error in the Supreme Court, as indicated in the title to the act. Inasmuch, however, as the constitutional provision requiring that the title of a bill shall be clearly expressed in its title has been held to be directory in *Pim v. Nicholson*, 6 Ohio St., 176, this paradoxical *faux pas* will be treated not as a *faux jour*, but as a true light thrown upon a cubic picture or painting of the legislative mind.

The facts, as conceded and admitted by counsel in argument and in their briefs, are that in May, 1916, The Union National Bank, one of the defendants in error, furnished the auditor of Cuyahoga county the information regarding its resources and liabilities and stockholders, as required and provided by Section 5411, G. C. Proceeding under Section 5412, G. C., the auditor thereupon fixed the value of the shares and property of the bank and reported the valuation so fixed and determined by him, to the State Tax Commission, as provided by Section 5417, G. C. (since repealed by act 106 O. L., 269). The bank reported that 20,000 shares of stock were outstanding and that the market value of these shares on the day the report was made, June 1, 1916, was \$187 a share. The auditor found from a consideration of the report of the bank and other sources, an affidavit perhaps of the president of the stock exchange, that the market value of these shares on the listing day for banks, between the first and second Monday in May, was \$187, and that the total value of the 20,000 shares was therefore \$3,740,000, and so reported to the tax commission.

On September 11, 1916, the tax commission made an order which, so far as relevant, is as follows:

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"The commission, coming on to consider further the returns of banks made to the county auditors, and as reported by the county auditors to the commission, and having carefully examined such additional returns, and having heard all complaints made concerning the value of the shares and of the property representing capital employed, as fixed by the county auditors, and having carefully and fully considered the same, it is ordered that the total value of the shares of (the Union National Bank of Cuyahoga county is \$3,417,130)."

It will be seen that the tax commission made a reduction of \$322,870. As to why this deduction was made, the transcript or record is absolutely silent, but it is admitted by counsel that the valuation of the tax commission is based upon the book value of the shares.

Book value is defined by the tax commission in circular 136, issued April 7, 1916, as follows:

"The book value should be ascertained by adding together the capital, surplus and undivided profits, from the total of which should be deducted the item of current expenses and taxes paid, the remainder being the book value of the entire capital."

The Constitution does not permit banks or bankers to deduct their debts from their moneys and credits. *Exchange Bank v. Hines*, 3 Ohio St., 1; *Ellis v. Linck*, 3 Ohio St., 67. Book value does not include the value of the real estate owned by the bank, as real estate is assessed under Article XII, Section 2, of the Constitution, and banks under Section 3 of this article, which latter section provides, however, that the "credits and effects" of banks shall be taxed so that real estate held only by limited title, as a mortgage or otherwise held as security for money loaned by the bank, is included in the book value. To avoid double taxation and conform to the constitutional provisions, the auditor, by Section 5412, G. C., is required to deduct the value of the real estate on the tax duplicate, owned by banks, from the value of the shares. Besides, it must be remembered that many banks transact their business in leased premises and do not own the real estate upon which the banks are located.

Obviously, the shareholders have an interest in the real property owned by the bank, and upon liquidation, this interest is available to them in proportion to their holdings. But for the purposes of taxation it can not be considered as part of the book value of the shares.

The real question, then, before the court is: Shall shares of banks whose capital or capital stock is divided into shares, be assessed for taxation at their market value or at their book value, or by some other practical equitable mode of assessment?

Article XII of the Constitution, so far as applicable, is as follows:

"Section 1. No poll tax shall ever be levied in this state.

"Sec. 2. Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money.

"Sec. 3. The General Assembly shall provide by law for taxing the notes and bills, discounted or purchased, moneys loaned, and all other property, effects or dues, of every description (without deduction) of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall bear a burden of taxation equal to that imposed upon property of individuals."

Three propositions stand out prominently and explicitly clear in the limitation imposed by the Constitution upon the state in the exercise of its inherent taxing power:

First, the limitation extends only to property, that is, any tangible thing that can be subject to ownership;

Second, all property shall be taxed by uniform laws according to its true value in money;

Third, the property of banks and bankers, whether incorporated or not, shall bear no greater burden of taxation than property belonging to individuals.

The Legislature has explicitly recognized that the limitations extend only to property as defined in the first proposition. Tangible as here used, of course means anything capable of being possessed or realized in the sense that a man can lay his hands upon it, secure or grasp it.

Section 5321, G. C., provides that "personal tax" and tax on personal property includes all taxes excepting only the tax upon real estate.

Section 5325, G. C., provides that personal property "includes every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of a parcel of real property."

This section further provides that money loaned on pledge, or capital stock of all kinds, is personal property.

Section 5326 provides further that money includes all deposits in banks, which the depositor is entitled to withdraw on demand.

Article XII is not a grant or delegation of power to the state to raise revenue by taxation, but rather a limitation upon that power. The right of the state to raise revenue by taxation for public purposes is an inherent and absolutely indispensable incident or attribute of sovereignty, as without this power a civilized state could not exist or discharge its governmental functions. *Western Union Tel. Co. v. Mayer*, 28 Ohio St., 521; see especially page 533.

In the Constitution of 1802, no delegation of power was granted or delegated to the state to raise revenue by taxation, except as found in Article I, Section 1, which provides that the legislative authority of the state shall be vested in the General Assembly. In the Constitution of 1851, and as we find it today, this inherent power indispensable to raise revenue for public purposes, is vested in the General Assembly. Article II, Section 1, *Western Union Tel. Co. v. Mayer, supra*; *Hill v. Higdon*, 5 Ohio St., 243; *State v. Ferris*, 53 Ohio St., 314, 330.

The Supreme Court has frequently recognized the right of the state to raise revenue by a tax upon certain occupations which, in the exercise of the police power, it is deemed expedient to regulate or control. Rights, franchises and privileges have also been taxed by license, as it is deemed in the exercise of the police power that certain occupations may be especially in need of public control, but revenue thus raised is not a tax upon property. *Western Union Tel. Co. v. Mayer, supra*; *State ex rel v. Ferris, supra*; *Baker v. Cincinnati*, 11 Ohio St., 534, 540;

Adler v. Whitbeck, 44 Ohio St., 539, 565; *Ashley v. Ryan*, 49 Ohio St., 504; and other cases might also be cited.

The Constitution, as amended in September, 1912, contains some grants of power, such as the right to receive or succeed to estates, the right to tax incomes, but even in these instances the laws must be uniform.

This phase of the subject under discussion is only referred to for the purpose of calling attention prominently to the fact that Article XII of the Constitution, that is, Sections 1, 2 and 3 thereof, are in no sense a delegation or grant of power, but are sharp and rigid limitations on the power of the state to tax *property*, in the sense we are now considering it. By reason of these limitations in raising general revenue, all property must be taxed without exemption or inequality of any kind, and any statute or rule of the tax commission, the county auditor or any board of revision, which would result in placing a greater burden of taxation upon one species or classification of property than upon another, would contravene not only these sections of Article XII, but also Section 2 of the bill of rights, which provides that:

"All political power is inherent in the people; government is instituted for their *equal* protection and benefit." *State v. Ferris, supra*.

On April 7, 1916, as already indicated, the State Tax Commission, under favor of Section 5624, G. C., issued to county auditors circular 136 as a uniform rule to govern them "respecting the manner of the exercise of the powers and discharge" of their duties. This section provides that the rules so presented and issued must be uniform rules. Circular 136, as far as applicable, is as follows:

"In fixing the value of the shares of national, state and unincorporated banks whose capital is divided into shares, county auditors are directed to fix the same upon the basis of the market value of such shares, if there is a market value for the same.

"The isolated sale of a small number of shares should not be considered as the market value, but the market value should only be taken where there is a sufficient number of sales of the

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stock to indicate the value of the same as dealt in by purchasers and sellers of the stock.

"In all cases where the shares have no market value or are not dealt in generally, and in the case of unincorporated banks whose capital is not divided into shares, auditors are directed to assess the same upon the basis of the book value as represented by the return of the bank."

The rule prescribed in this circular was manifestly illegal and in contravention of the organic law of the state, for the reason that it prescribes a market value rule for shares "if there is a market value for the same," and a book value "in all cases where the shares have no market value or are not dealt in generally." There is surely a want of uniformity in this rule and it can be readily seen that in the application of the rule, injustice and inequality is quite probable.

It is a matter of common knowledge that there are many banks, the shares of which are so valuable that they seldom, if ever, are sold, even at private sale, and are never sold upon the stock exchange. They are what may be termed close corporations. In the smaller cities and villages of the state there are hundreds of incorporated banks having shares, most of which are owned by a few individuals or families as investments, and are not known or heard of in the trade marts, and are seldom, if ever, sold even at private sale. There are, for instance, in the city of Cleveland over 90 banks, about 50 of which are incorporated, the stock or capital being divided into shares. So far as known to the public through the medium of the press, the shares of not to exceed fifteen of these banks have any market value.

Market value, given in its broadest signification, means the value shown, fixed or estimated by public or private sales effected in the ordinary course of business, or a price established by public sales, or sales in the way of ordinary business, as of merchandise. *Murray v. Stanton*, 99 Mass., 348.

It should be remembered, however, that these definitions are subject to the qualification that the seller must be under no necessity to sell, and the buyer free to purchase or not, as he chooses. In other words, that the market must be an honest

market and not a speculative or trading market. If there is no record of public sales available to the auditor, how is he to ascertain or obtain information as to private sales? As a rule, men are not disposed to make public their private and personal affairs. Hence, if for any reason the shares of a bank are given a fictitious or trading market value, it will be readily seen that an inequality is more than likely to arise in listing some shares at their apparent market value, and others at their book value, in which event the organic law of uniformity would be practically nullified.

The real difficulty in this case is to determine what the framers of the Constitution meant by true value in money. The word "value" has a wide and at times an elastic meaning, and much learning has been expended by economists in defining its scope and application. It would be a waste of time and energy, however, and be of doubtful aid or assistance to consider the question from the economist's viewpoint. Generally and concretely speaking, value means worth. The phrase in the Constitution is not the true value or worth, but the true value in money. Does the addition of the word "money" mean the *price* of the property? If so, there is this distinction: that value is worth estimated by exchange of commodities in general, while price is worth estimated in money. Evidently the latter was the meaning intended by the framers of the Constitution. The object of construction as applied to written constitutions is to give effect to the intent of the people adopting them, that is, the voters or people approving the Constitution are presumed to have adopted and thus given effect to the intent of the framers of the organic instrument, but "this intent is to be found in the instrument itself." Cooley Con. Lim., 89.

In *Gibbons v. Ogden*, 22 U. S. (9 Wheat.), 1, 183, Marshall, C. J., said that the framers of a constitution and the people who adopt it,

"must be understood to have employed words in their natural sense and to have intended what they said."

The same view is expressed by Shauck, J., in *State v. Lynch*, 88 Ohio St., 71, 96.

A rule or perhaps a guide to construction, however, that should not be overlooked, is to determine, if possible, what, if any, evil or mischief, if any, did the constitutional convention of 1851 seek to remedy or prevent by imposing the limitations of Article XII upon the general or inherent right of the state to raise revenue by taxation. The thing which we are to seek is the thought which the language expresses and to ascertain this, resort must be had first to the natural signification of the words employed. As has been seen, the only limitation on the taxing power of the state found in the Constitution of 1802 is that the Legislature shall never pass a poll tax for county or state purposes. With this exception the inherent power of the state was unlimited.

An examination of Chase's statutes of 1825 shows startling inequalities and a glaring lack of uniformity in the exercise of the taxing power. See *Exchange Bank v. Hines*, 3 O. S., 1, 12. The confusing chaos of tax legislation as the constitutional convention of 1851 found it, was perhaps no greater than that found by the Legislature of 1917, when an emergency (not subject to referendum) act was passed. 107 O. L., 29. By this emergency act, twenty-five sections of the taxing laws were amended, seventy-seven sections repealed, and twenty-eight sections re-enacted. In Section 4 of this act, page 45, the Legislature declared that the emergency law was necessary for the preservation of the public safety, and that the necessity arose

"from the fact that recent judgments of the Supreme Court have declared unconstitutional many of the laws of Ohio providing for the valuation and listing of real and personal property for taxation, by reason whereof, the state and its political subdivisions are without adequate means for levying and collecting taxes for the year 1917 and the year thereafter."

No comment of the court upon this appalling condition is necessary.

By referring to the Debates of the Constitutional Convention of 1850-51, we find that the committee on finance and taxation in its first report provided, in Section 2, that

"The Legislature shall provide by law a uniform rule of assessment and taxation, and shall prescribe such regulations as

will secure a just valuation of all property, both real and personal."

Section 4 as reported provided that

"The Legislature shall provide for taxing bank capital, and the issues of banks, railroad stock, turnpike company stock and canal company stock, the same as personal property is taxed."

Debates Constitutional Convention, 1851, p. 513.

On December 9, 1850, it was proposed to levy taxes upon all residents of the state, in proportion to the amount of property and assets owned by each, deducting therefrom the debts owed by him. The day following, an amendment was proposed that the assessment and taxation should be according to the actual value of the property of every description.

On December 18th a substitute was proposed, the main idea of which was that

"The rule of taxation shall be equal and uniform throughout the state."

On March 8, 1851, a select committee, to whom was referred the whole subject, reported it back with two amendments, the principal one of which was that

"Uniform laws shall be passed upon the subject of taxation, embracing all property according to its true value in money."

On March 7, 1851, Section 3 was amended as it practically appears today.

An examination of the debates and the reports of the committee on finance and taxation of the convention of 1851 clearly indicates that the ruling and controlling idea was uniformity and equality, and that the phrase "nothing can not be something" is axiomatic in regard to taxation, or, in other words, that no man should be taxed for what he has not, but only taxed for that which he owns or has. The leading or dominant idea or thought in the mind of the convention was that taxation should be by "uniform rule," based "on a just valuation of all property, both real and personal."

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The distinction between capital employed in banking and other personal property was recognized. This distinction is readily understood. The capital employed in a trading or manufacturing enterprise or corporation, or a public service corporation, ordinarily consists of assets physical and tangible in character, such as machinery, appliances and appurtenances of all kinds, things that can be easily located, ascertained and seen. The assets of a banking company or association, whether incorporated or not, are more illusive, certainly not so patent and open to observation. These assets consist of moneys on deposit, surplus, loans, credits, investments, negotiable instruments and mortgages and collateral held as security therefor. The nature, character and amount of these assets is necessarily within the knowledge of the bank officials and those having business relations with the bank. Hence the constitutional convention deemed it wise, salutary and expedient that the General Assembly should provide by law that assets of this kind should

“bear a burden of taxation equal to that imposed upon the same amount of property, capital, money and credits and effects belonging to individuals.”

Obviously the rule of uniformity as to classification and true value in money and as to rate provided by Article XII, Section 2, applies with equal force and is equally as binding upon the Legislature and listing and assessing offices in relation to the property of banks.

It would be interesting to follow the proceedings of the convention and note the evolution or development of Article XII into the form in which it finally appears, but as we are seeking only to obtain the viewpoint of the framers of these limitations, that will not be necessary.

On December 10, 1850, in a proposed amendment the question of value appeared for the first time in Section 2 and the words “actual value” were used. In a subsequent proposal the words “just valuation” appear.

On March 8, 1851, as has been said, the select committee to which was committed the question, reported Section 2, so far as now concerns the matter under consideration, practically as we find it today.

A substitute was at one time proposed that property should be taxed

“upon its value, which shall be ascertained in such manner as may be provided by law, making taxation equal and uniform.”

While this was rejected, it is interesting to note that uniformity and equality was at all times dominant in the minds of the framers of the Constitution. Throughout all the debates and proceedings of the convention, as has been indicated, three cardinal principles stand out prominently as controlling factors:

First, uniform laws only shall be passed upon the subject of taxation, embracing all property;

Second, all property shall be taxed according to its true value in money;

Third, banks shall bear a burden equal only to that imposed upon the property belonging to individuals.

If we bear these limitations in mind, a just determination of the question before us ought not to be difficult.

Owners of stock in Ohio corporations are not required to list the stock for taxation, Section 192 G. C. The property of the corporation being taxed, it would be double taxation to tax the stock which represents that property; but indirectly the stockholder does bear his share of the burden of taxation, as its payment by the corporation in a measure decreases the dividends paid the stockholder. While banks having shares pay this tax, as measured by the true value in money of the shares, still the effect is the same as in other corporations, as the bank deducts the amount of the tax paid from the share owners or holders, Section 5673 G. C. That is, their dividends are proportionately decreased or lessened. Manifestly, the law or rule taxing all personal property, including that of corporations, banks, incorporated or unincorporated, must be uniform, and this property must be assessed or listed at its true value in money.

If the contention of plaintiff in error is sound, then if a manufacturing or public service corporation has, for instance, outstanding 300,000 shares of stock, par or market value \$100,

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it should pay a tax on \$30,000,000. If the market value of the shares was \$150, then it should pay a tax on \$45,000,000. In other words, if incorporated banks are taxed on the market value of their shares, uniformity requires the same rule shall apply to all corporations. We know this is not the rule in Ohio or in this county.

We think the case of *Cummings v. National Bank*, 101 U. S., 153, directly in point. Prior to 1879, the settled rule prevailed in a large part of the state of Ohio, by which real estate and ordinary personal property was listed or estimated at one-third of its true value, and moneyed capital at three-fifths of its true value. The state board of equalization of banks increased the valuation of the shares of the Toledo bank to their full value. The bank brought its bill in equity to enjoin the treasurer from collecting the tax so assessed. In part 2 of the syllabus, the Supreme Court of the United States hold,

“That the rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessment, is in conflict with that Constitution (Ohio), and works manifest injustice to the owners of bank shares.”

The court say, page 157, in commenting on the Ohio statute providing for injunction against the collection of taxes illegally assessed:

“Independently of this statute, however, we are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally, or to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of this unconstitutional exercise of power.”

In *Exchange Bank v. Hines*, 3 Ohio St., 1, the court had under consideration an act of the Legislature providing for the taxation of banking companies. The court said in the opinion, page 15, that

“Taxing by a uniform rule requires uniformity, not only in

the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation."

And further, that

"the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property may be taxed alike, *equally*—which is taxing by a uniform rule."

The language is plain and unmistakable. The uniform rule requires not only that the *rate*, but the *mode of the assessment* shall be uniform, and extends to *all* property subject to taxation.

The General Assembly evidently had these decisions in mind in 1917 when the emergency act was passed.

Section 5404, G. C., provides that the secretary or principal accounting officer of corporations shall list by oath of person listing, all personal and real property, including money and credits of all corporations, including banking corporations, necessary to the daily operation of the company, at their value in money.

Section 5405, G. C., provides that these returns shall be made to the auditor, who shall ascertain and determine the value of the property so listed, deducting the value of the real estate.

Section 5408, G. C., provides that all shares of incorporated banks and unincorporated banks whose capital is divided into shares, and

"the capital employed, or the capital representing it, in an unincorporated bank whose capital stock is not divided into shares,"

shall be listed and taxed at its true value in money. The word "true" as used means exact, just, accurate or conformable to reason. "Actual," while it means practically the same as "true," there is this distinction: actual is opposed to apparent or imaginary and relates to the present, as opposed to the past, that which really is, not that which can or may be.

In listing shares of banks, the future possibility of the shares, or what they can be worth or may be worth, must not be considered. It is the exact, just, accurate value at the time of list-

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ing that must be taken into consideration by the listing officer. Obviously the rule of uniformity is infringed and contravened if incorporated banks are taxed upon the market value of their shares, and unincorporated banks or banking associations, whose capital is not divided into shares, are taxed according to book value. In one case a *certain* and absolute rule is fixed for banks whose shares are listed or quoted on the stock exchange, and another, an uncertain, illusive and indeterminate rule, dependent upon the honesty, veracity and good faith of bank officials, is necessarily fixed for the valuation of unincorporated banks or banking associations whose capital is not divided into shares. Unquestionably injustice and inequality must, in the nature of things, necessarily result from such a mode of assessment.

The market value of bank shares, as ascertained in a fair, honest market, that is, as such shares are ordinarily sold and purchased in the community in good faith, may be considered by assessing officers, boards of revision or the tax commission, as a factor in estimating their true value in money, but to use and consider the market value of the shares as the sole, only, controlling factor or guide in determining their true value in money, to the exclusion of all other considerations affecting their true value in money, would be an unfair, unstable and unreliable rule or mode of assessment to prescribe or follow, and would undoubtedly, in many instances, contravene Article XII, Section 3, of the Constitution, and impose upon banks having shares a burden of taxation grtater than that imposed upon property of individuals. The manifest effect of the limitations in Article XII, Sections 2 and 3, of the Constitution is to make *property* the sole basis for the taxation of banks and joint stock companies, and nothing is to be considered but the true value in money, so far as banks are concerned, of the notes and bills discounted or purchased, money loaned, property, effects and dues of the banks.

While a corporate franchise may, in some instances, be taxed under the general powers of the state, the taxation of the franchise of an incorporated bank is inhibited by Article XII, Section 3, of the Constitution.

In *Exchange Bank v. Hines*, *supra*, the court say on page 8, in construing Article XII, Section 2:

"A corporate franchise, therefore, being a mere privilege or grant of authority by the government, is not *property of any description*, and consequently not subject to taxation under the above provision of the Constitution."

In *State v. Ferris*, *supra*, the court distinctly approved this doctrine, and said, page 329:

"That a franchise is not property, within the meaning of said section (2), was held by this court, *for reasons which seem unanswerable*, in *Exchange Bank v. Hines*, 3 Ohio St., 1."

In *Exchange Bank v. Hines*, *supra*, the court was considering Article XII, Section 2, and assumed that this section was a grant of power, instead of a limitation of the power of the state to raise revenue, but the Supreme Court has since held that all three sections are limitations and not grants. Referring to the dictum in *Exchange Bank v. Hines*, that Section 2 contained a grant of power, Burket, J., said, in *State v. Ferris*, *supra*, at page 330:

"That such is not the true or correct construction of the Constitution is now universally conceded."

Or, in other words, as has been said, the three sections referred to are limitations, and not grants of power.

Obviously, if the franchise of a joint stock company or the corporations named in Article XII, Section 2, is not property, neither is the franchise of an incorporated bank. This is self-evident, and its franchise is not subject to taxation by reason of the limitation of Section 3.

Unincorporated banks may have a good will, but not a franchise right or privilege, and while it is admitted that different species of property may be classified and subjected to different modes of assessment, it must not be forgotten that the paramount result to be obtained is

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“The ascertainment of the true value in money of the property embraced in the respective classes, and the taxation of all property by uniform rule.” *State v. Jones*, 51 Ohio St., 492, 508.

All modes of assessment, no matter to what species or classification of property they apply, must have in view this result and no other. To assess the shares of incorporated banks at their market value as listed and quoted on a stock exchange, as was done in the instant case, and to assess the property, effects and assets of unincorporated banks by a wholly different rule, would necessarily be a violation of this fundamental constitutional principle. If, for instance, as under former statutes, real estate was valued by assessors or appraisers, personal property by oath of owners, subject to modification by equalizing or other officers, and bank shares by the auditor, upon sworn statement or returns of the bank president and cashier of the actual value in money of such shares, this diversity in mode of assessment for fixing the value for taxation of the different species of property is

“not necessarily in conflict with the provisions of the Constitution which require all property to be taxed by a uniform rule, and according to its true value in money.” *Wagoner v. Loomis*, 37 Ohio St., 571.

But the court say in the opinion, page 580, by way of qualification,

“that an honest and intelligent discharge of duty by those intrusted with the execution of the respective modes provided by law, would accomplish all that was intended by the Constitution.”

Or, as Dickman, C. J., said in *State v. Jones*, *supra*, the different modes of assessment should all have

“in view one result, the ascertainment of the true value in money of the property embraced in the respective classes, and the taxation of all property by a uniform rule.”

The tax on a franchise is in its essential nature the same as the license tax. In the case of a foreign corporation, the tax is exacted for the privilege of exercising its corporate powers in the state. In the case of a domestic corporation, it is the amount paid as the price of its corporate existence. Burroughs, Taxation, page 166.

Recognizing the right of a state to tax a franchise, it must be held, however, that by reason of the limitations of Article XII, Sections 2 and 3, of the Constitution, the corporate franchise of a bank can not be considered as property for purposes of taxation, as it is an intangible thing, a mere license or privilege, and in no sense tangible in the sense that notes, bills, moneys, effects, loans, securities, collateral and dues are tangible.

But is the market value the true value in money? Possibly it might be if the market were an honest and a fair market, where bulls are not horning, bears growling or shorn lambs bleating; but a market value or price is not an honest value or price when effected, as it too often is, by operators, who, being long in a particular stock and desiring to sell, manipulate the market and raise prices, or, being short and desiring to buy, manipulate the market and lower prices. Operators, by a series of wash sales, can easily depress or lower the price of a stock enormously, although the physical, tangible assets and property back of the stock are in no way affected by the slump.

In *Winnipiseogee L. C. & W. Mfg. Co. v. Guilford*, 67 N. H., 514, the New Hampshire statutes relating to taxation were under consideration. These statutes require that

“The selectmen shall appraise all taxable property at its full and true value in money, as they would appraise the same in payment of a just debt due from a solvent debtor, or at its just value.”

The Supreme Court of New Hampshire, in passing upon this statute, said that

“Such value is the market value or price which the property will bring in a *fair* market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price for it.”

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Surely this is not a trading market value. A man desiring for some purpose to become a director in a bank, finds it necessary to secure a large block of the shares of the bank. He is willing and does give more than the true value in money for the shares, for the reason that he expects, by becoming a director, he may serve his own personal ends and be vastly more benefited in the end than by any loss he sustained in purchasing the stock at more than its true value, and yet, if he sends his agents upon the stock exchange to purchase the stock, the value of the stock may be enhanced by this personal, and not general, demand for the stock. If this should occur just before the listing day, then the other shareholders of the stock would be unjustly taxed if the market value was taken as the criterion of assessment.

If, for any reason, by a series of wash sales or otherwise, just prior to the day of listing, the shares of a bank should be depressed largely in value, the state would be the loser, if it adopted the market value basis as its sole mode of assessment.

Within the past few years, war conditions have tremendously affected the market price of stocks which were earning fair dividends. These stocks were sold in large blocks to raise money to put into "war bride" stocks. This had a tendency to lower the market price, although the *actual* value of the stock remained unaffected, as the dividends earned and paid remained unchanged. The court has in mind a particular instance of a public service corporation whose charges for service were affected by political considerations, as well as cost of operation. Costs of operation imperatively demanded in this instance, owing to war conditions, an advance in charge for service, but political promises and exigencies interposed a personal, selfish and unreasonable opposition. The *deus ex machina* of the political stage, openly suggested and advocated, to save an embarrassing situation, that the share owners contribute one-third of their dividends to the general public. This suggestion, morally dishonest and wholly insincere, together with prevailing war conditions, decreased the market price of this stock at least 15 points, but

the dividend earning ability of the corporation was wholly unaffected by these war conditions and sinister influences.

If the rule of fixing the value of the shares at their market price was adopted in this instance, the state would be the loser, and unjustly so, and under the circumstances, it can not be said that the market value was a fair and honest market value.

Again, the market price of bank shares is largely affected by the personal equation of good will. The personality of a bank president or manager may attract depositors as a magnet attracts iron, and thus enhance the good will of the institution, but then good will is not property within the meaning of the tax laws. It may be property as between the buyer and the seller of the good will, but it is not taxable property. It is not a right, franchise or privilege, nor is it personal property.

In *Western Union Tel. Co. v. Poe*, 61 Fed., 449-459, Taft, J., said:

"It would certainly cause a surprise and shock to the business community of Ohio to have it decided that it is the duty of every business firm and corporation to return for taxation the estimated value of its good will and the estimated value of the skill and experience and economical management of the employer and employe, or to use such factors of its profits to increase the taxation of its tangible business capital."

Our attention is called to the case of *State v. Jones*, 51 Ohio St., 492, and it is claimed the doctrine of this case is that a corporate franchise may be taxed, under Article XII of the Constitution. Counsel have evidently misconstrued the doctrine of this case. The most that this case, so far as the opinion is concerned, holds is, that the market value of capital stock has some relation to the value of the tangible property of the corporation, and that it has, to some extent, a reflex action on the value of the property. The court in this case had under consideration what are known as state corporations, deriving their powers directly from the state, under special laws or statutes, and not under the general corporation laws, with the right to do business in all parts of the state, and so far as telegraph and telephone com-

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panies are concerned, the exclusive right of way throughout all parts of the state, and not necessarily subject to local control, at least without the consent of the municipalities through which their lines run and in which they do business. This case does not hold, either in the syllabus or in the opinion, that a franchise may be taxed under favor of Article XII, Sections 2 and 3, of the Constitution. In the opinion, the court does say, page 510, that

“Taking the market value of the entire capital as a *datum*, the board is only *guided* thereby in ascertaining the true value in money of the company's property * * *. The capital stock is clearly not the same as the property possessed by the corporation, for the capital stock remains fixed, although the *actual property* of the corporation varies in value and is constantly increasing or diminishing in amount.”

As has been said, the most that this case holds is that the market value may indirectly enter into the true value in money of the tangible property and assets of the corporation, and may be considered as a factor in estimating the true value in money of the property owned and controlled by the corporation.

The Constitution of 1802 and 1851, and that as amended September, 1912, expressly prohibited the imposition of a poll or a capitation tax on the adult male population of the state. There is abundant reason for this, politically, economically and historically. A poll tax precipitated a rebellion in England in 1381, known as the Peasant Revolt. In England in early times a poll tax was graduated according to the *dignity* of the payer. In France in 1695 the classification for a poll tax was according to the estate and rank of the payer.

To tax good will would be to tax personality, dignity, honor and intelligence. Such a concept is hideously unthinkable, and yet market value is more or less influenced by good will, an intangible, unstable thing dependent upon personality, or reputation, which death, misfortune or accident or other calamity may render valueless in a few days. There are many decisions that cash value, actual value, market value and saleable value are

interchangeable and convertible terms, but an examination of these authorities will show that in most instances the courts had under consideration the value of real estate or personal property and not the value of stocks. The decisions in Ohio as to value have reference to the value of property where it arises upon indictment for a criminal offense.

In *State v. Yates*, 10 Dec. Re., 182 (19 Bull., 150), value was held to be the utility of an object, the worth of an object in purchasing other goods. The court here had under consideration the value of a dog.

In *Chidester v. State*, 25 Ohio St., 433, the word "value," as used in the code of criminal procedure, is said to be used in the sense of "effect," "import," and not in the sense of "worth in money." The court here was considering an indictment where forgery was charged.

In *Burdge v. State*, 53 Ohio St., 512, forgery was also under consideration, and it was said that the word "value," as used in the statutes, does not mean value in money, as between parties, but value or effect only as a legal instrument.

It should be borne in mind that the decisions of the Supreme Court herein quoted can not, strictly speaking, be regarded as precedents, except when applied to statutes practically similarly to those the court had under consideration in each particular case. These decisions can not be taken as applying to tax laws generally, unless this clearly appears from the rule or doctrine of the case decided.

Take, for instance, the case of *Western Union Tel. Co. v. Mayer*, 28 Ohio St., 521. The act under consideration required a foreign telegraph company to pay a tax on its gross receipts for the next year preceding the return for assessment. The telegraph company claimed that under the return made the auditor of the county, of its gross receipts, that practically four-fifths of the receipts so returned were for business which originated or terminated at a point or points outside of the state of Ohio. The court, however, said, in the eighth paragraph of the syllabi, that the provisions of this act were

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“in effect, a charge for the *privilege* of exercising its franchises and powers with the state, graduated according to the amount of *receipts*,”

and in the seventh part of the syllabi, the court said that this privilege is not property within the meaning of the limitations of the Constitution.

In *State v. Jones, supra*, the court had under consideration the construction of practically the same sort of statute; or, in other words, the right of the state to tax, under its general inherent powers, the franchises or privileges of a corporation deriving its powers from what is termed a state franchise.

It seems exceedingly difficult to reconcile some of the reported cases in Ohio, construing Article XII, Sections 2 and 3, especially so far as they relate to uniformity in mode of assessment and true value in money. Obtaining the value of property by different modes of assessment for different classes or species of property, as gathered from these decisions, may not be repugnant to the letter, but it is clearly obnoxious to the spirit, of the Constitution. While statutes providing for or permitting such classifications or different modes of assessment are tolerated by the courts, they are not favored.

As was said in *Wagoner v. Loomis, supra*, the different modes of assessment for different classes or species of property was not “*necessarily* in conflict with the provisions of the Constitution,”

requiring uniformity of rule as

“an honest and intelligent discharge of duty by those intrusted with the execution of the respective modes provided by law, would accomplish all that was intended by the Constitution.” Page 580.

But suppose some taxing officials are dishonest or incompetent, the excuse and apology for the rule or holding of the Supreme Court fails, the doctrine becomes unsound, and the door to the realm of inequality is opened wide, and this is just what the Constitution seeks to prevent. The use of the qualifying

phrase "not necessarily in conflict," or that uniformity in the mode of assessing all species of property is not an indispensable requirement, in the sense that equality of taxation can not be otherwise secured, clearly indicates that the court did not intend to lay down a rule absolute—one without exception, as it is dependent upon the honesty and good faith of the taxing officials. That equality of taxation can be secured by different modes of assessing different species of property, providing tax officials honestly and efficiently perform their duties, is the essence of the doctrine of this case. It in no way contravenes the doctrine of *Exchange Bank v. Hines*, *supra*, which is really the landmark on this subject, as it is undoubtedly the best considered case on the provisions of the Constitution under consideration. The court was clearly of the opinion that no language in the Constitution was more important than the phrase "taxing by uniform rule," and the court said, page 15, that

"Taxing by uniform rule requires uniformity, not only in the rate of taxation, but also uniformity in the mode of assessment upon taxable valuation. * * * But the uniformity in the rule required by the Constitution does not stop here. It must be extended to all property subject to taxation, so that all property may be taxed alike, equally—which is taxing by uniform rule."

This doctrine has never been explicitly modified or overruled.

The qualification as to uniformity found in *Wagoner v. Loomis*, *supra*, is based upon the evident reluctance of the Supreme Court to declare taxing laws unconstitutional, for the reason that to do so creates fiscal emergencies that are likely to result in the bankruptcy of the state or its political subdivisions. For the reason, in *State v. Jones*, *supra*, the rule that the presumption is in favor of the validity of the law is carried to the extreme.

That this principle is well recognized, is illustrated by the fact that some self-constituted association, acting under favor of the initiative clause of the Constitution, submitted an amendment providing for classification of property, which amendment

was adopted at the last state election. Another amendment, however, was submitted by the Legislature, amending Article XII, Section 2, empowering the Legislature to pass laws providing against double taxation, especially of real estate and the mortgage or debt secured by the real estate. Both these amendments were adopted. As they are inconsistent, both can not stand, as a Constitution inconsistent with itself, or containing inconsistent provisions, is legally unthinkable.

The tax legislation of the state seems to be in a condition of chaos and a condition worse than confounded. Aside from these inconsistent constitutional provisions, the legislation relating to taxation, as patched by the crazy quilt legislation and the emergency act of 1917, is a maze as confusing as the Egyptian Labyrinth described by Herodotus. Manifestly, the state needs a scientific revision and codification of its tax laws, by men who have breadth of vision and clarity of expression, and who have a thorough economic and legal knowledge of the subject, if it would escape economic fiscal complications and disaster.

It should be an axiom of taxation that nothing can not be something for the purpose of legitimate taxation, or, in other words, property for purposes of taxation must be a physical actuality. If an operator or speculator, long on some particular stock, bulls the market and raises the price ten points or more, the physical, visible, tangible property represented by the stock remaining unchanged or stationary, he, in effect, changes nothing into something, and a law or rule that would tax this nothing is unjust and contrary to the letter and spirit of the Constitution.

The first part of Adam Smith's second axiom is in this connection of paramount importance; that is,

"The tax which each individual is bound to pay ought to be *certain* and not arbitrary."

If the value of the shares of a bank are determinable by the fluctuations of a speculative market, subject to the sinister activities of individuals and not by a fixed law or rule, then the

tax is not certain, but arbitrary and in contravention of this universally accepted maxim.

Uniformity, certainty and equality of taxation is the essence of Article XII, Sections 2 and 3 of the Constitution, and we must hold that the contention of the plaintiff in error is subversive of these wise and salutary limitations. We fully appreciate that the auditor occupies an unenviable position. When banks report to the federal government, they are impelled of necessity to make the best possible showing and list their negotiable securities and instruments at their full value, but when they report to the auditor, they become like unto

“A Niobe daughter, one arm out,
Appealing to the bolts of Heaven,”

and strenuously insisting that these negotiable instruments, notes and securities are not of their full face value, but that, owing to changed financial conditions of the makers of the notes and signers of the securities, the value of the paper has decreased, even as the cat fish of Uncle Mose “am swunk.”

It is axiomatic that the entire burden of taxation, as far as possible, should fall equally upon all classes and individuals, and be borne equally by all classifications and species of property, and that modes of assessment should show no trace of special incidence. Surely a just and a reasonable mode of assessment can be devised for listing personal property, including the shares of incorporated banks and unincorporated banks whose capital is divided into shares. In case disputes arise between the banks and the auditor, the board of revision or the tax commission, testimony should be taken and records made, and in case a petition in error is filed in the court of common pleas or other court, this record should be part of the transcript filed in the court of common pleas with the petition in error. If this was done, the grotesque spectacle of having a court of record perform ministerial duties as a mere assessing board would be obviated.

In view of the reasons advanced, we must hold that the act of the auditor in assessing the shares of the Union National Bank

solely according to their market value, as quoted upon the Cleveland Stock Exchange, is in contravention of statute and constitutional law. As we do not know upon what theory or basis the tax commission reduced the valuation fixed by the auditor, we are unable to say that there is any error in the record or transcript. We are not prepared to say that book value, as ordinarily understood, is the true or legal rule by which banks should be taxed. We can only say that it must be presumed that the tax commission, in reaching the conclusion it did, was acting in conformity with law, and for that reason the petition in error will be dismissed, and the plaintiff in error will be given an exception.

We desire to express our sense of obligation to counsel for their able presentation of the issues involved and their research in marshaling of authorities. We are under special obligation to counsel for plaintiff in error, whose knowledge of tax problems is profound and illuminating, and for his valuable assistance graciously rendered after the case had been heard and submitted. It was refreshing to have this member of the bar candidly intimate that he was more interested in the final adjudication of the question than in the matter of professional pride or official vindication.

As the question of jurisdiction, raised by counsel for defendant in error, is not likely to arise again under the statute, a decision thereon would be merely academic and of no practical utility.

PRESUMPTION IN AN ACTION ON A NOTE.

Common Pleas Court of Franklin County.

HERBERT HENNICK v. ROBERT E. WAGNER ET AL.

Decided, December 20, 1918.

Pleading—Allegations in Action on Note in the Short Form—Raise the Presumption of Innocent Holder—How this Presumption is Best Met.

1. In rebutting a presumption of law the bringing upon the record of some new fact is preferable to an equivocal and unauthorized form of denial.
2. In an action on a note in the short form the plaintiff is presumed to be an innocent holder, and demurrer does not lie to the defense that part of the note is usurious.

Wilson & Rector, for plaintiff.

Doud, Crawfis, Dones & Bradford, contra.

KINKEAD, J.

Counsel for defendant submits a brief on the demurrer to the first defense of the answer which has heretofore been overruled. It is stated that no copy of the brief of plaintiff on the demurrer had been furnished defendant's counsel. This seems remarkable,—that the punctilious counsel for plaintiff would thus omit to comply with the rule. All lawyers are expected to keep themselves advised of motions and demurrers when pressed for hearing.

In view of the statement of defendants' counsel, the matter is given further consideration.

The cause of action is one upon a promissory note pleaded in the statutory short form.

The defense demurred to states that \$1,470 of the amount of the note was usurious, \$1,000 in money only being advanced to Wagner. The pleader evidently means \$470.

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Hennick v. Wagner et al.

The claim in support of the demurrer is that plaintiff is an innocent holder for value; therefore the claim of usury can not be available to defendant. The former order overruling the demurrer was based upon the theory that plaintiff, being an innocent holder for value, such defense can not now be interposed against him.

But counsel for defendant contends that his answer

“admits that he signed and executed the note with James P. Fuller to Mrs. F. J. Baus for \$1,470 as set out in plaintiff’s petition, but defendant denies each and every allegation in plaintiff’s petition contained not herein specifically admitted to be true.”

By virtue of this allegation defendant claims that he denies that plaintiff is an innocent holder for value. So denying he claims that \$470 was an amount of interest exacted in excess of that allowed.

The writer will continue to condemn the form of denial contained in defendants’ pleading, as in *Bakas v. Casparas Stone Co.*, 14 N.P.(N.S.). 577. An answer can appropriately contain either (1) a general, or (2) specific denial, or (3) new matter. Nothing more is authorized. These exclude an equivocal plea of admission and denial such as denial of each and every allegation in plaintiff’s petition not herein specifically admitted to be true.

Pomeroy states, Code Rem., Section 525:

“The codes require a general denial, or specific denials, or defenses in confession or avoidance, * * *. The general denial is * * * intended to negative all averments: * * * a specific denial * * * must be addressed to some single, particular allegation. * * * Each specific denial ought to be a single and separate defense by itself. (They) were intended to be analogous to * * * special traverses * * *. Certain it is that the codes do not, by any stress of their language, contemplate an answer consisting of a general denial directed to a part only of the * * * petition, and connected with other admissions, partial denials, and explanations. * * * If the answer is such a mass of express admissions, partial explanations, and statements of matter, etc., * * * we have all

the evils * * * of the most vicious system or no system that can possibly be conceived. * * * The kind of answer * * * I have described violates every principle of this theory, and is a contrivance of ignorance and indolence.

"Notwithstanding the foregoing considerations," says Pomeroy, * * * "the courts of some * * * states have given a seeming approval to this most slovenly manner of stating the defense of denial." Pom. Code Rem., Section 526.

This court will give effect only to a general or specific denial, or plea of new matter, either upon questions arising upon pleadings or at trial. The plain provisions of the code can be enforced in no other manner. The tools of the code are much more efficient than the loose method contrary to its provisions so common in practice.

In the present case we have no specific allegation of any fact in the short form of pleading, showing plaintiff to be a *bona fide* holder, an innocent holder for value. This is taken for granted, or presumed from the facts stated and copy of note as found in the short form of pleading.

Defendant asks to have this presumption of fact rebutted by a form of admission and equivocal denial not authorized by law.

The former decision overruling the demurrer is adhered to. However, leave will be granted to defendant to amend his answer by conforming to the provisions of the Code.

It seems doubtful whether a denial of a presumption of law would be appropriate. The way to rebut the same would rather seem to be by bringing upon the record some new fact, as that plaintiff took the note with notice.

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Regan, Executrix, v. Cain.

**COMPENSATION CLAIMED FOR VOLUNTARY CARE OF A
DECEASED RELATIVE.**

Common Pleas Court of Hamilton County.

HONORAH REGAN, EXECUTRIX UNDER THE LAST WILL AND TES-
TAMENT OF CATHERINE McNULTY, DECEASED, v.
JOHN J. CAIN.

Decided, March, 1919.

*Aged Relative Provided with a Home and Care—No Agreement, Express
or Implied, as to Compensation—Possession Given by the Invalid of
Her Securities—Which are Claimed After Her Death as Compens-
ation.*

1. A valid gift *inter vivos* requires delivery to the donee, and relinquishment of dominion over the property by the donor; where the evidence shows that after the delivery of such property as an alleged gift to the donee, the donor continued to exercise dominion and control over the same, and the donee recognized it as belonging to the donor, the evidence disproves a gift.
2. In the absence of an express contract to pay for the same, a claim for services rendered by one member of a family to another member thereof can not be sustained.
3. In an action for an accounting only those items can be allowed which are supported by proper evidence. No speculation can be indulged as to the state of the accounts.

C. C. McGary and Dickerson, Black & Dickerson, for plaintiff.
L. F. Ratterman, contra.

DARBY, J.

The petition alleges that the plaintiff is the executrix of the estate of Catherine McNulty, deceased; that deceased died January 11, 1917, in Pennsylvania, and that prior to her decease she delivered to the defendant a certificate for six shares of stock of the Cincinnati Gas & Electric Company and two unregistered bonds, for the sum of \$500 each, issued by the Toledo, Bowling Green & Southern Traction Company, upon which bonds interest coupons were attached in the amount of

\$300; that the delivery of the stock and bonds to the defendant was made to collect the interest on said bonds as they matured and the dividends payable on stock, and that defendant agreed to account for same to decedent and hold the same for her as her agent; that this delivery was made by reason of the age and infirmities of the decedent; that during the life of decedent the stock was sold for a sum unknown to the plaintiff; that defendant claimed to have expended a certain amount of the proceeds of same for said decedent; that the said bonds were in the possession of the defendant at the time of the death of the decedent, but the defendant has refused to deliver the same to plaintiff and has also refused to account for the proceeds of the sale of the stock. The prayer of the petition is that the defendant be required to account for the proceeds of the stock and bonds and coupons and for a judgment against him for any sum found to be due with interest.

An amended answer was filed during the trial, which consists of two defenses: (1) a general denial; and (2) substantially as follows:

That prior to 1906, the decedent boarded and lived with the father and mother of the defendant for about twenty-five years; that she was unmarried and a sister of defendant's mother, and during said period was furnished a home, without consideration, and that during the last six years of the time the defendant had aided his father and mother in the maintenance of the home; that defendant's mother died in 1906; that he was married in June of 1906, and that thereafter, in 1907, the deceased returned to his home and lived there for a period not stated; that at no time while residing with the defendant did the deceased pay or give any consideration to the defendant or his wife for board and home furnished her; that from July, 1907, to April, 1911, decedent lived at various places away from the defendant, but during said period frequently visited the home of the defendant; that in April, 1916, decedent was ill, living with a woman, stranger to her, and the defendant, learning of this, caused her transfer to a hospital, where she was ill for two weeks; that while his said aunt was at said hospital defendant and his wife visited her and she expressed a wish to return

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to the home of defendant, "promising that if this defendant would again take her into his home she would turn over to him everything that she had;" that during subsequent visits the decedent repeated her request to return to his home and to live with defendant and his wife, and "this defendant finally did consent to permit her to come and live with him and his wife at their home, and thereupon before leaving the hospital she turned over to this defendant the key to her safe deposit box and gave to this defendant all that was contained in same;" that thereupon the said decedent went to the home of the defendant to live and the defendant secured from her safe deposit box the certificate for the stock referred to and also the two bonds with the coupons attached; that shortly thereafter the defendant had decedent endorse said certificate of stock and he sold the same and his said aunt endorsed the check to him; that thereafter the decedent continued to live at his home and required various sums of money, which defendant furnished to her, but kept intact the two bonds referred to "because his said aunt had been a great burden to him and his wife and he desired to have this fund with which to pay an entrance fee for her into some home if the care and burden of keeping her became too great for himself and wife;" that in the fall of 1916, decedent expressed a wish to visit her sister (the plaintiff in this case) at Scranton, Pennsylvania, and left Cincinnati to visit her, this defendant furnishing her with money needed for the trip, and that while she was at Scranton he sent money to the decedent, and after her death there, in January, 1917, he paid all funeral expenses. The last paragraph of the answer is as follows:

"That if the same were not to be regarded as compensation for taking his said aunt into his home, the amount involved would be insufficient to compensate him for what he and his family have done for his said aunt, and what was done for his said aunt was not done with a view of only doing what his said aunt could afford to pay for."

And defendant prays that plaintiff's petition be dismissed.

On the trial of the case the plaintiff called the defendant as a witness for the purpose of cross-examination, under favor of

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\$300; that the delivery of the
 was made to collect the interest
 and the dividends payable to
 to account for same; that
 her agent; that
 and infirmities
 the stock
 defendant
 pr.

... examination of the adverse party,
 ... the privilege of the statute ren-
 ... incompetent because the plaintiff was
 ... that the only evidence in the case which bore
 ... of the defendant with the decedent consisted
 ... testimony and that of his wife. Defendant's testi-
 ... was in substance as follows:
 ... when the decedent became ill and was taken to the hos-
 ... that she visited her there and she made the proposition to him
 ... that she would turn over to him all that she had if he would
 ... take her into his home. This proposition was under considera-
 ... tion by the defendant and his wife for some days, when he
 ... finally accepted it, and the decedent turned over to him, through
 ... his wife, the safety deposit box key, and shortly thereafter the
 ... decedent was taken to the home of the defendant. The defend-
 ... ant further stated that he took the stock from her safety deposit
 ... box and placed it in his own, and that it was sold some time in
 ... June, 1916, the amount realized from the same being \$450.
 ... The defendant stated that about the time the stock was sold
 ... decedent asked him to sell it; that he thereupon got the stock
 ... from his deposit box, took it to her, and she endorsed it (evi-
 ... dently in blank). He thereupon took it and sold it and re-
 ... ceived a check payable to her order. She then endorsed the
 ... check (evidently in blank), defendant cashed it and took the
 ... money back to her, and she thereupon handed it back to him
 ... and told him that it was for his birthday and to pay for a
 ... Ford machine, which he had recently bought, and she stated at
 ... the time that if she had more she would buy a self-starter.

It is admitted that the defendant paid her bill at the hos-
 ... pital; that from the time she went to his home until October,
 ... a period of about six months, he advanced other moneys to her,
 ... which will be more particularly referred to and are all men-
 ... tioned in a letter written by him to the plaintiff, which is in
 ... evidence. The defendant testified that in addition thereto, he
 ... advanced her small sums of money from time to time as she
 ... would need them, to go to the city, shopping, etc., and he stated
 ... that he had no account of these small amounts, but that in his

ey would amount to from \$75 to \$100, and upon being give his best estimate of the amount he fixed it at \$100. The defendant admitted writing a letter to the plaintiff, whom, it should be remembered, was also his aunt and a sister of the decedent, dated December 11, 1916. It is a long letter and some extracts will be made from the same which seem to be important.

On page 2 of the letter, the defendant states to the plaintiff that—

“Aunt Kate (decedent) is entirely irresponsible in regard to money matters. I suppose you have noticed that by this time. She does not seem to realize the fact that she can not have all the money she wants and everything she wants.”

This letter contains a number of statements by defendant as to the property of the decedent, which are as follows:

“Now the fact of the matter is that all Aunt Kate has is a bond in the Toledo, Bowling Green & Southern Traction Company which calls for \$1,000 when it matures, which will be in about four years. If it were sold today all it would bring would be about \$800. Now I do not want to touch this bond, as it is all she has and she will probably need it. I am doing the best I can to keep her in funds without touching this bond. The bond pays five per cent., or \$50 a year. That is her entire income as far as her money is concerned.

“If she continues to demand money at the rate she has been asking for it, I will have to sell her bond and give her what she wants. If I do this her income of \$50 a year will be gone and she will have what she wants as long as it will last. Then she will have to depend on others for her support. I think I have been generous to her and have kept my word to her to look after her as I have been so kindly reminded of in her letter, and I think she has received enough to make her feel independent.

“Now the time is coming when it may be necessary to make some other provisions for Aunt Kate. She will in all likelihood have to enter a hospital or a home, as she is suffering from hardening of the arteries. Aunt Kate was never told of this, as the doctor and sisters said it was best for her not to know it. You know what that leads to. She wanted to enter a home here before she made up her mind to visit you. Now it will take a \$1,000 to do that. In a place where she can be independent and come and go as she likes. She can not expect to

stay on with you and she can not seem to be content here. Now if I continue to furnish her money at the rate she has been getting it, where will all this come from? Dr. Hoppe of the Good Samaritan Hospital examined her. He is about the best nerve specialist in the country. He says there is nothing the matter with her back; that it is entirely a mental condition caused by the hardening of her arteries, and that as the disease progresses she will become more feeble and will have to have constant attention. The only place she can get this is in a hospital. So I am going to try to keep what she has left together so that she can be properly taken care of when that time comes."

There was a reference made in the testimony to a will made by the decedent in Scranton, after she went there in October, but the will was not offered in evidence nor its contents in any way proved. But there was testimony that the decedent had no property whatsoever except the stock and bonds referred to, and it is fair to be presumed that she made or attempted to make some disposition of one or the other of these in her will.

Defendant offered in evidence a letter written to him January 27, 1917 (bearing date, by mistake, of the year 1916), by his aunt, the plaintiff in this case, in which, among other things, she states that in a conversation with the decedent that the latter stated: "I know he will take care of what is mine."

The defendant further testified that during the period of the residence of the decedent at his home, from the spring of 1916 until October of that year, she was constantly ill and required a great deal of care, which he and his wife administered to her, and that the condition of his aunt was such as to require care similar to that given to a child.

In the letter of December 11, 1916, from the defendant to the plaintiff, he enumerates a number of sums of money which he had expended for the decedent before she left his home, which aggregated \$109.80, and in that letter says:

"That makes \$109.80 she has received from me since she came home from the hospital. Now don't you think that is a lot of money for her to spend? As she has had absolutely no expense to pay of any kind. I bought her medicines, paid for her dentist bill and tried my best to get her what she wanted."

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The testimony was that at Christmas time, 1916, the defendant sent decedent \$25, and that after her death he paid her funeral expenses, aggregating \$234.75. There were other small items enumerated, such as a dentist bill of \$3, a lawyer, \$5, masses at Scranton, \$25, telegrams \$7.50. The total of all these items, which are not in dispute, being \$410.05.

The defendant further testified that the sale of the bond was made on or about March 3, 1917, and with the accrued interest thereon netted him \$714.17.

The testimony of Mrs. Cain, wife of the defendant, was directed principally to her visits to the hospital, during which decedent stated she would turn over to defendant all she had if he would take her home and take care of her, and that she was required to massage decedent, help her bathe and dress morning and evening; that it was hard to humor or please her; that a great deal of extra work was required of her, and that decedent was quite exacting; that it was on her first visit to the hospital to see decedent that decedent handed her her money, jewelry and keys to the safety deposit box, which the witness later gave to the defendant; that nothing was said about boarding the decedent, but that the board and services rendered to her were reasonably worth \$15 per week.

This was, in substance, the testimony in the case, excepting that the plaintiff offered in evidence the original answer of the defendant, which agrees with the amended answer, excepting that the original answer contains a paragraph eliminated from the amended answer, as follows:

“This defendant gave the attention and care to his said aunt for the sake of his mother, with whom his said aunt lived as aforesaid for twenty-five years or more, and his aunt made the gift to him as aforesaid not to compensate him in any way for what he and his wife had done prior to the gift or might do thereafter, but solely as a token of appreciation, knowing that this defendant and his family had always taken excellent care of her and always would continue to do the same.”

Briefly stated, the plaintiff claims that a trust was created in the defendant, for the benefit of the decedent, and that his dealings and decedent's dealings with the stock and bonds indicate

this; while, on the other hand, the defendant claims, in the first place, that it was a gift, and, in the second place, if it was not a gift, that he is entitled to compensation for services rendered to the decedent.

In the discussion of this case it must be constantly kept in mind that the plaintiff relied almost exclusively, to prove her case, upon the testimony of the defendant, and the position is taken by the plaintiff that though the defendant now claims that he is entitled to the property either as a gift or as compensation for services rendered, that his actions relative to the property are inconsistent with either claim and consist rather with the claim of the plaintiff that he held the stock and bonds for the decedent and that he is now accountable to her executrix.

Does the evidence support the claim that a gift of the stock and bonds was made by the decedent in her lifetime to the defendant?

"A gift *inter vivos* has been defined as an immediate, voluntary and gratuitous transfer of his personal property, by one to another. It is essential to its validity that the transfer be executed, for the reason that there being no consideration therefor, no action will lie to enforce it. A gift *inter vivos* has no reference to the future, but goes into immediate and absolute effect. To render the gift complete, there must be an actual delivery of the chattel, so far as the subject is capable of such a delivery, and without such a delivery the title does not pass." *Flanders v. Blandy*, 45 Ohio St., 108, 113.

"Whether a gift is *inter vivos* or *causa mortis*, or made through the medium of a trust, it is none the less a gift and subject to the conditions which the law places upon gifts; and whether the gift is made to a third person as agent for the donor or as trustee for the donee, there must be such a distinct and absolute delivery of the property as to show a relinquishment of all dominion over the property by the donor. 14 A. & E. Ency Law (2 Ed.), 1025, 1026. 'To constitute a valid gift the transfer must be consummated, and not remain incomplete, or rest in mere intention; and this is so whether the gift is by delivery only, or by the creation of a trust in a third person by the donor; enough must be done to pass the title.' *Martin v. Funk et al*, 75 N. Y., 134. 'The acts must be of that character which will admit of no other interpretation than that such legal rights as the settlor retains are held by him as trustee for the donee; the settlor must either transfer his property to a trustee

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or declare that he holds it himself in trust. An intention to give, evidenced by a writing may be most satisfactorily established and yet the intended gift may fail because no delivery is proved. And where an intention to give absolutely is evidenced by a writing which fails because of its non-delivery, the court will not and can not give effect to an intended absolute gift by construing it to be a declaration of trust and valid, therefore, without delivery.''' And cases cited. *Worthington v. Redkey*, 86 Ohio St., 128, 134.

There seems to be no room for discussion that a valid gift *inter vivos* must not only be delivered to the donee or some one for him, but that the donor must relinquish any dominion over the gift.

The defendant, in seeming contradiction of his claim that the bonds and stock were given and delivered to him by decedent before her removal from the hospital, testified that after her return to his home he took the stock from the safety deposit box at the request of his aunt and took it to her for endorsement. She seems not to have endorsed it to him, but rather in blank. He then went out and negotiated a sale of the stock and got the check for the proceeds in her name, which he took and delivered to decedent. She endorsed this check again in blank, and when he cashed it he carried the money back to her and claims that she then gave it to him as a birthday gift to buy a Ford machine.

With reference to the bonds in question, the letter of the defendant written to the plaintiff, on December 11, 1916, contains pertinent and cogent evidence that he did not consider that he was the owner. He speaks of the bond as being "all she has and she will probably need it," and says:

"I am doing the best I can to keep her in funds without touching this bond. The bond pays five per cent., or \$50 a year. That is her entire income as far as her money is concerned."

Continuing, he says:

"If she continues to demand money at the rate she has been asking for it, I will have to sell her bond and give her what she wants. If I do this, her income of \$50 a year will be gone and she will have what she wants as long as it will last."

Further along, speaking of placing her in a home, he says:

"I am going to try to keep what she has left together so that she can be properly taken care of when that time comes."

In this letter there is no suggestion that he is the owner of the bonds, or that the decedent had given or attempted to give them to him, but throughout the expressions are clear that they belong to her.

The defendant further offered in evidence a letter written by the plaintiff to him, in which she states a conversation had with the decedent, in which the decedent stated: "I know he (defendant) will take care of what is mine." The defendant undertook to explain his testimony concerning the transfer and sale of the stock, the handling of the check and its proceeds, by saying that it was a whim of the decedent.

The testimony showed that the deceased was a maiden lady past seventy years of age; that prior to the alleged delivery of the safety deposit box keys to the defendant, that defendant's brother, Rev. Cain, had joint control of her deposit box, which was known to the defendant.

Taking into consideration all the evidence in the case, the relations of the parties, their dealings with one another and with the property in question, the court is of opinion that the evidence fails to sustain the claim that there was a gift of the property to the defendant by his aunt.

Was there a contract between the parties, upon which the defendant has a right to claim compensation for services rendered?

The amended answer sets forth that the decedent had lived many years in the home of the defendant's parents, as a member of the family, and without paying for the same. Just prior to the time the defendant took her home, in April, 1916, she had been living with strangers; became ill, and the defendant, learning of this condition, procured her removal to a hospital, where she was for some two weeks and then went to his home.

It is difficult to understand the statements of the amended answer concerning the former relations between the decedent and the family of the defendant, and the reasons for inserting those allegations in the amended answer, unless they are read

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in connection with that part of the defendant's original answer which was eliminated from the amended answer but offered as an admission. That language is as follows:

"This defendant gave the attention and care to his said aunt for the sake of his mother, with whom his said aunt lived as aforesaid for twenty-five years or more, and his aunt made the gift to him as aforesaid not to compensate him in any way for what he and his wife had done prior to the gift or might do thereafter, but solely as a token of appreciation, knowing that this defendant and his family had always taken excellent care of her and always would continue to do the same."

The defendant and his wife testified that they, their children and the decedent lived together as a family, and that there was no agreement or understanding that there should be any compensation for any services that might be rendered to her.

In the letter of December 11, 1916, the defendant said: "She (decedent) has had absolutely no expense to pay of any kind."

The court is of the opinion, from the evidence, that when the defendant took the deceased to his home, in April, 1916, he had no other thought or intention than to render to his mother's sister the same kindly services which she had received during the life of the parents of the defendant, and that he was not actuated by any motives of gain and that there was no thought or intention on his part or on the part of the decedent to give him her property. It was a kindly act done from the purest of intentions, and the present claim, in the opinion of the court, is an afterthought, asserted after her death, probably because he felt that his family was more entitled to the property of the decedent than were her Pennsylvania relatives.

The law is well settled in this state as to a right to recover for services rendered to one member of a family by another:

"In an action to recover compensation for services, when it appears that the plaintiff was a member of the family of the person for whom the services were rendered, no obligation to pay for the services will be implied; and the plaintiff can not recover in such case unless it be established that there was an express contract upon the one side to perform the services for

compensation, and upon the other side to accept the services and pay for them." *Hinkle et al, Exrs. v. Sage*, 67 Ohio St., 256.

A case similar to the one last referred to is *Merrick v. Ditzler*, 91 Ohio St., 256, in which the same conclusion was reached.

The facts of these cases are not exactly the same as in the case at bar, but the principle is the same, and in the face of the statement of the defendant in his original answer that the gift to him was not to compensate him in any way, but solely as a token of appreciation, knowing that he and his family had always taken excellent care of her and always would continue to do the same, there is no room for the claim that there was a contract.

The court is constrained to find for the plaintiff, and the question now for consideration is as to the amount which is to be allowed to the defendant under the testimony.

The evidence showed that the total amount received as the proceeds of the sale of the stock and bonds was \$1,189.17. The items referred to in the letter of December 11, 1916, by the defendant, aggregate \$109.80. The funeral expenses paid by the defendant are admitted to be \$234.75. Other small items are agreed to, aggregating \$65.50. Making the total of expenditures to or for the use of the decedent, \$410.05.

It should be remembered that besides these items, the defendant testified that he had made small payments to the deceased while she lived with him, of which he kept no account, and which he could not state with accuracy, but his impression was that they amounted to \$75 to \$100 and, when pressed for his best judgment as to the amount, stated \$100. In the letter of December 11, 1916, referred to, he enumerated the items making the \$109.80, but made no claim that he had expended any other money.

Can the court allow a claim for \$100, or for any other amount, which is not proven, but which is, in effect, no more than a guess? Of course, absolute accuracy is not required, but something must be given upon which the court can form its judgment.

As stated in the case of *Oglesby, Exr. v. Thompson*, 59 Ohio St., 60, 63:

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“Disputed facts, in civil suits, are determined upon reasonable probabilities—a mere preponderance of evidence is sufficient to determine the affirmative of an issue. The cases referred to, however, afford no authority for saying, that the court may speculate as to the state of accounts, or allow a recovery for an item without any proof as to the state of the accounts as between the partners. In *Slater, Myers & Co. v. Arnett, supra*, the syllabus is as follows: ‘Where suit in equity is instituted to settle the accounts of a dissolved firm, one of the members being dead, and the report of the master to whom the accounts have been referred, shows that, after diligent search, he has been unable to discover and report any evidence whatever to base a statement of the true condition of affairs between the members of the late firm and of its assets, etc., the court, not being able to proceed to judgment upon suppositions and presumptions without evidence, can do no better than to withhold its hand, and to leave the parties to stand where they have placed themselves before the suit was brought.’ ”

In the opinion of this court, this item of \$100 has not been proven and can not be allowed.

The defendant will be charged with \$1,189.17, and credited with \$410.05, and judgment given against him for the balance—\$779.12.

**PROSECUTION FOR VIOLATION OF A SANITARY
ORDINANCE.**

Superior Court of Cincinnati.

LOUISA C. PUMMILL V. CITY OF CINCINNATI ET AL.

Decided, March 10, 1919.

Injunction—Does not Lie to Prevent Prosecution for Violation of a Health Ordinance—Where the Effect Would be in the Nature of Prohibition—When Equity Would Warrant Injunction.

1. Injunctive relief can not be obtained to restrain the prosecution criminally for the violation of a municipal health sanitary ordinance, admittedly valid, where the penalty involves a fine with no interference with property rights and no irreparable injury is involved.
2. But if such ordinance, admittedly valid, precludes the right of taking the case to a higher tribunal, and the case involves property rights, without adequate relief in law resultant in irreparable damage, equity will grant an injunction.

L. H. Pummill, for plaintiff.

Saul Zielonka and Frank H. Bowman, contra.

GUSWEILER, J.

This cause is before the court on the question of the enforcement by criminal proceedings in the municipal court of Cincinnati against the plaintiff, of a health ordinance of said city compelling sanitary connection of certain real property of the plaintiff.

Plaintiff does not attack the validity of the ordinance in question, but does contend that it is invalid as to plaintiff in that if enforced against plaintiff it would violate her property rights.

The property rights alleged about to be violated are recited to be a forty year user of plaintiff's open drain to the sewer which, if forced to be changed to a direct sewer connection,

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would cost plaintiff \$87.50, this amount being more than 10 per cent. of the value of the property in question.

The question for our determination is, assuming that plaintiff at present has an open drain system on her realty satisfactory to her and made and used for more than forty years in compliance with some former municipal ordinance; that plaintiff's realty is of a value of about \$800; that the new cost would be \$87.50; and that the validity of the present sanitary police regulation is not attacked, do these facts involve property rights with attendant irreparable injuries, etc., justifying chancery relief by injunctive order restraining the city from enforcing said present ordinance against plaintiff by a fine?

Were everything alleged in plaintiff's petition admitted to be true, nevertheless as a matter of law we are of the opinion that this case does not present facts justifying a restraining order. It is quite true that the effect of the enforcement of the ordinance referred to might be a hardship upon plaintiff, in view of the value of the realty compared with the probable cost of the change, nevertheless it can not be successfully contended that the city has not this power to legislate from time to time on police regulation and sanitary needs. In the modern day the needs of a community, of a health, sanitary and police regulation kind, change from time to time and the realty situated in a community is bound by all such regulation, if reasonable, without regard to the special effect it might have upon a certain specific piece of realty.

The cost of the improvement or the value of the property can have no bearing on the validity of the ordinance or the enforcement thereof, where no general attack on the legality thereof is made.

We believe further that the court is without jurisdiction in the instant case, for the reason that the enforcement of criminal responsibility does not involve the property in question. If the ordinance is not complied with plaintiff may be held liable to a fine, etc. If the enforcement involved a wrongful destruction or irreparable injury to property without relief in law a different question would be presented. The case at bar does not compel plaintiff to surrender the right to the use of the property in order

to avoid the imposition of penalties upon her that when enforced must work irreparable injury. The effect of plaintiff's petition is to call for the relief granted under a writ of prohibition and not injunction. We are asked to stop the progress of a criminal proceeding or trial, and not to restrain an unlawful usurpation of property rights affected by the enforcement of some illegal criminal procedure. We are in accord with many of plaintiff's citations, but we see a difference between enjoining a criminal trial as such, and enjoining the enforcement of a criminal ordinance which with a penalty wrongfully interferes with plaintiff's property rights. No attempt is being made in this case to confiscate or destroy any property right or to deprive plaintiff of property rights of any character.

It follows that the restraining order heretofore granted is hereby dissolved at plaintiff's costs.

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DETERMINATION AS TO CAUSE OF ACTION.

Common Pleas Court of Franklin County.

THE GRAND FRATERNITY V. V. W. MOSS ET AL.

Decided, December 11, 1918.

Action for Recovery of Money on a Contract of Employment—Counter-Claim Based on Acts of a Tortuous Character Subject to Demurrer—Joinder of Inconsistent Claims—Subject of Action Distinguished from Cause of Action.

1. Where in an action by a fraternal beneficiary association against one of its collectors and the surety on his bond, for the recovery of money on a contract of employment, he is charged with acts of fraud, dishonesty and misappropriation of funds in the amount sued for, the contract is the transaction giving rise to the cause of action; and the subjects of the action are the acts constituting the violation of plaintiff's legal rights under the contract.
2. A counter-claim, in such action, filed by the defendant collector, for damages caused by the plaintiff's circulation of printed matter charging him with embezzlement of the same money referred to in the petition, is based upon a different transaction, tortuous in nature, and is not connected with the subject of the action, essentially, but casually only. Such counter-claim is therefore demurrable.
3. The subject of an action or subject-matter of an action is embodied in the acts or facts alleged to have been violative of a legal right, and the defendant is at liberty to set up a counter-claim only when it is based on an affinity of right which will afford the same harmony between the subject of the action and the counterclaim that is found between causes which may be properly joined.

Smith W. Bennett and Barton Griffith. for plaintiffs.

Vorys, Sater, Seymour & Pease, contra.

KINKEAD, J.

Plaintiff's action is for the recovery of \$2,038.52 from defendant Moss, and from the surety upon a bond given by him to plaintiff. Moss was an agent, superintendent and collector for a branch organization of plaintiff, which is a fraternal beneficiary association. The petition pleads the contract of employ-

ment, its terms and conditions, and the alleged breaches on the part of the defendant.

The former opinion sustaining the demurrer to the cross-petition was not specific in stating the gist of plaintiff's cause of action. In making an analysis of the cause, statement was made that money embezzled or misappropriated by Moss was the transaction involved by plaintiff's cause; that it was also the subject of the action.

The opinion did not fully or accurately state the cause stated. It is in fact founded upon contract; the petition recites the appointment of Moss as plaintiff's agent; it sets forth his duties as defined in the constitution and by-laws. The amount of compensation or salary is alleged. The petition charges Moss with acts of fraud, dishonesty and misappropriation of funds; that he refused to account for money collected, and that \$2,038.52 is due from him.

To charge the defendant, the National Surety Company, with liability on its bond as surety for Moss, the petition recites that the constitution and by-laws, which were part of the contract between plaintiff and Moss, required the latter to give a bond. It is charged that the contract of the surety company agreed to reimburse plaintiff for loss sustained by act of fraud, dishonesty, larceny, embezzlement and misappropriation of funds.

The petition, to fix the liability of the surety on its bond, charges Moss with violation of his contract; charges that by his acts of fraud, dishonesty and misappropriation of funds in the amount sued for, in order to charge the surety company with its liability under the bond given by it.

In giving an analysis of the cause of action in the former opinion, we mistakenly considered the specific charges of misappropriation having special relation to the liability of the surety, in characterizing the nature of the cause of action.

The transaction out of which plaintiff's right and cause of action against Moss and his surety arises is a contract. It is a cause for the recovery of money under a contract; money which defendant is obliged to pay as agent for defendant; money which the surety must pay under its contract. The "subject of the action" is the right of plaintiff to recover money.

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Counsel for the cross-petitioner states that it is necessary to have a clear conception of action declared upon in the petition; he declares it is to be a cause of action upon a contract to recover for the breach thereof.

We regarded the cause as one for the recovery of money due plaintiff under a contract; money which defendant is obliged to pay in his capacity as agent of plaintiff. It is money claimed to be due under a conditional contract which constitutes an evidence of indebtedness.

Counsel for plaintiff claims that *Mogle v. Black*, 5 C. C., 51, affirmed without report in 51 O. S., 582, is conclusive of the question. The cause of action in that case was one for damages for assault and battery. By way of counter-claim defendant averred that immediately preceding and connected with the assault which is the foundation of plaintiff's cause, the plaintiff maliciously slandered defendant damaging him in the sum of \$2,000. This must be the conclusion of the court writing the opinion and not the language of the pleading. A demurrer was sustained to the cross-petition setting up the alleged counter-claim. The circuit court reversed the case for error in sustaining the demurrer. This is unlike the present case. It must be assumed that both plaintiff and defendant were claiming damages arising out of one "scrap or assault." If the defendant made the assault he would be liable; if plaintiff made the first assault then defendant could recover. The transaction was the assault; it was a single occurrence.

There is no doubt of the correctness of the decision in *Mogle v. Black*, *supra*, but its conclusion has no relevancy on the question in the case now before the court. In the present case plaintiff seeks to recover money from defendant due by the terms of a contract.

Defendants cite the case of the *Cincinnati Tribune Company v. Bruck*, 61 O. S., 489, as direct authority upon the question at issue. This decision, or rather what is stated in the *pur curiam* report has given us greater concern.

The action was for libel; Bruck complained that the Tribune Company had libeled him and sought damages. The Tribune Company sought to counter-claim one tort against another, set-

ting up an alleged cause of action for the malicious prosecution of a civil action against it by Bruck. It appears that after Bruck had commenced his groundless civil action against the Tribune Company, in which he sought the appointment of a receiver, the latter company being provoked by the civil suit published an article in its paper which was libelous in character. It does not appear that the question of counter-joinder of such claim by the defendant was made until at the trial, when the court withdrew the Tribune Company's claim for malicious prosecution from the jury, but in its charge left it to be considered in mitigation of damages. The only question to be decided on the Tribune Company's petition in error was whether the court erred in taking its alleged counter-claim for malicious prosecution from the jury. The Supreme Court held it not to be error because the company did not have a cause of action under the peculiar Ohio rule, for the reason that there had been no seizure of property. But in the course of the *per curiam* opinion the statement was made that:

"If, * * * the facts stated constitute a cause of action * * * for * * * damages against * * * plaintiff for * * * malicious prosecution * * * it is very clear that they *would* constitute a counter-claim. * * * They are connected with the subject of the action; and this is sufficient to warrant their being pleaded as a counter-claim. Section 5072, R. S., Swan Pl. & Pr., 259, note."

If the facts had constituted a cause, they *would* have constituted a counter-claim, because they were connected with the subject of the action. This clearly is an expression of an opinion concerning a question not involved in or presented by the record. The facts did not constitute a cause of action, hence there could be no such question of joinder presented for decision.

However, this dictum of the *per curiam* is carried into the syllabus by the court, which by universal custom is considered the law. But no opinion or rule stated, not founded upon a question actually presented and in fact decided, can be regarded as a rule of decision, whether stated in a syllabus or an opinion. This dictum of opinion is in line with the contention of defendant's

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counsel in this case, but it is not in accord with fundamental conceptions and rules under the code.

The clear intent of the code provisions, permitting the joinder of more than one cause of action in a petition and the counter-claim of a cause of action in a cross-petition, is that no incongruous claims should be brought into an action for adjudication. The purpose and intent is that the plaintiff can not join causes which are inconsistent, and that defendant may not plead a cause of action by way of counter-claim that is inconsistent with or has no direct connection with the cause of plaintiff by arising out of the same transaction as that from which plaintiff's cause arose.

The only basis for contention in such problems is the provision of Section 11317, "*or connected with the subject of the action.*"

A cause of action by way of counter-claim must arise out of the contract or transaction which is the foundation of plaintiff's claim, or it must be connected with the subject of the action.

In philosophizing upon the meaning of the code provision learned writers and judges express the view that "subject of the action" is not synonymous with "cause of action;" that the former is something different from the latter. The transactions out of which causes arise being connected with a "subject of action" must be in existence simultaneously with the transactions, and prior to the time when the causes of action commence. Therefore it is said the "subject" must be different from the cause of action. The whole passage at best, it is asserted, is a difficult one to construe in such manner that any explicit and definite rule can be extracted from it. Pomeroy's Code Rem., Section 369 (4th Ed.). In *Ponca Mill Co. v. Mikesell*, 55 Neb., 98 (1898), it was stated that: "The vagueness of that language has caused the profession much difficulty."

It is said:

"*The subject of the action* was what was formerly understood as the subject-matter of the action." *Box v. Ry. Co.*, 107 Iowa, 660.

We do not believe this to be a correct conception of the meaning of the language of the statute. The subject of the action con-

sists of the acts charging the violation of legal right. The subject of a counter-claim is the right shown to have been violated by the facts alleged. These acts or facts disclosing violation of right to be joined in the petition, or as counter-claim by cross-petition, must either arise out of the same transaction, or in the counter-claim it must be connected with the subject of the action.

"Subject of the action" is said to be the same as the subject-matter thereof; that would mean the constituent elements. But the term "subject of the *action*" can not have reference to the *action*, because the latter is only a proceeding in court in which a cause of action is set forth. If the expression is the same as the subject-matter of the cause of action, then it has reference to its constituent elements, as one of the definitions of "matter" is "constituent elements."

All uncertainty and vagueness disappears when we view the subject of the cause or action as the facts violating a primary right, rather than some casual loose connection with facts which are not an essential part of the cause of action.

It must not be *casually* connected with the subject of the action as in the *Tribune Co. v. Bruck* case, where the newspaper proprietors became angered over Bruck's groundless action and printed a libelous article. The connection of that unwarranted counter-claim with Bruck's cause of action for libel was *casual* or *incidental*, depending upon the fortuity of human acts and inclination. It has no connection in reason and logic based upon the facts disclosing infringement of legal right which in all actions must be the subject thereof.

Though the code is liberally construed, still there must be an exactness and perspicuity in the classification of the subjects and principles of law, in the rights of persons, and particularly in the rights and causes of actions. The subject of the action has reference to facts disclosing violation of legal right.

Rights and causes of action are classified according to rights of persons and of property. According to the rule of decision in this state the malicious prosecution of a civil action injures the right of property or of person. This is not entirely logical nor in accord with the rule in other states. The gist of the cause is the groundlessness thereof, malice and seizure of

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the property or arrest of the person being incident to the malicious prosecution. The decision in *Tribune Co. v. Bruck, supra*, was based solely on want of seizure of property.

The logical conception is that rights of action and causes of action are classified according to rights of persons and rights of property. The civil action is the legal vehicle for the redress of injuries to such rights.

The provisions of the code in respect to the joinder of causes and the interposition of a counter-claim are based entirely upon the classification of rights. It was the intent and purpose that separate causes for injuries to rights of person or property could be settled in one action when they affected the same right. The spirit of the code authorizing a counter-claim to be set up by a defendant, when it has a connection with the subject of the action, is that there shall be the same harmony of action as in the joinder of causes. It was not intended to authorize a counter-claim to be pleaded in an action unless there was an affinity of right.

The fact that the groundless malicious prosecution of a civil action which affected no right of property or person, "*provoked*" the libel by the Tribune Co. (in *Tribune Co. v. Bruck, supra*), does not sufficiently connect such groundless cause—the alleged injury affecting no legal right—with the *subject* of the *cause* of Bruck against the Tribune Co., which was an injury to the reputation of Bruck caused by a false and malicious publication.

To be connected with the subject of the *action* means connected with the subject of the *cause of action*. The subject of the action is disclosed by the statement of facts showing a violation of a right of person or property. All the cases in Ohio, viz: *Coal Co. v. Upson*, 40 O. S., 17; *Pope v. Pollock*, 46 O. S., 367, and the previous one of malicious attachment do not harmonize with correct principles of classification, nor do they follow the trend of opinion elsewhere. (The writer may be permitted to make reference to a discussion of "The Right of Action Upon Principle Stated" where we have stated that the lack of harmony among American Authorities 'leads us to believe that there has not been a proper appreciation of the *right* injured.' Kinkead on Torts, Section 415.) This subject will not be pursued fur-

ther. We justify the extensive consideration of *Cincinnati Daily Tribune Co. v. Bruck*, 61 O. S., 487, because the syllabus states that "the facts are sufficiently connected with the subject of the action for the purpose of a counter-claim," etc., and because it is the only case militating against the views here expressed. We have given it extensive consideration for this reason, and also because we feel certain that the statement in the syllabus was not essential to the decision, and the expression of opinion is in fact erroneous.

The language of the statute concerning a counter-claim is that it must be connected with the subject of the action. Reference is made to a discussion of the subject of the action by Judge Davis in *Railroad v. Hollenberger*, 76 O. S., 177, 181. He finally concludes on page 183:

"We prefer the construction of Prof. Pomeroy, that the Legislature used the terms 'subject of the action,' in place of, and with the same meaning as 'subject-matter' of the action."

We can not believe that there may be joinder of causes, and joinder of a counter-claim upon any other basis than the subject of an action contemplates *and relates* to the right violated. The subject-matter of an action is the right violated, and a counter-claim may be interposed by a defendant when it arises out of the transaction giving rise to the plaintiff's cause.

We have not changed the common-law causes of action, the intent of the code being that only consistent causes may be litigated in one action whether as causes or counter-claims.

In the present case, as already stated, plaintiff's cause of action is for recovery of money claimed to be due by defendant as an agent of plaintiff operating under a contract; a cause of action for money arising under a conditional contract for money. The subject of the action is the right of plaintiff to recover money from defendant who received and collected it for plaintiff pursuant to a contract made between the parties. This is an action in contract.

The alleged counter-claim is based upon a different subject entirely—a tort—an alleged wrong having casual relation to the conduct and acts of the parties arising from an alleged circula-

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tion of printed matter charging defendant with embezzlement. Contract and tort are radically different subjects of the law. The subject of the plaintiff's cause and defendant's alleged counter-claim differ radically from each other; one is based upon contract the other upon tort. It is well known that tort and contract causes can not be litigated in the same action either as causes or as cause and counter-claim.

We have written a long opinion again; but when it is so strongly urged upon rehearing that we are wrong it seems justifiable to cover the ground. Tort can not be counter-claimed against a cause for money claims on contract, merely because the person seeking money judgment incidentally committed an independent act not arising out of the transaction giving rise to claim for money, but which is founded upon a casual act of circulating printed matter concerning defendant.

In *John Parish v. Frank H. Powell*, in this court, case No. 53521, plaintiff sued for money claimed to be due for work on a building owned by defendant. The latter set up an alleged counter-claim based upon acts of negligence in the work by plaintiff by reason whereof defendant's building was injured. This branch of the court in its charge to the jury took this alleged counter-claims from the jury for the reason that it was a clear liability in tort, and for this reason, under our statutes, defendant could not assert a counter-claim claiming damages on that account. Plaintiff recovered judgment for the amount due him, and error was prosecuted to both reviewing courts which affirmed the trial court.

The former decision sustaining the demurrer is adhered to.

DAMAGES FOR INJURIES RESULTING IN INCURABLE INSANITY.

Superior Court of Cincinnati.

ABE L. DERNHAM, GUARDIAN, v. THE CINCINNATI TRACTION CO.

Decided, March 1, 1919.

Compensation for Injuries—May Cover Expenses Voluntarily Provided for by Another in Advance of Suit—Causing Insanity not a Ground for Damages Beyond Charges for Proper Maintenance—Province of the Jury with Reference to an Award for Pain and Suffering.

1. In an action for damages for personal injuries, brought by a guardian on behalf of his ward, a ruling to the effect that expenses resulting from the injury and which had been voluntarily paid by the guardian in his individual capacity as brother of his ward could not be recovered from the defendant is erroneous, but the error may be corrected by overruling plaintiff's motion for a new trial on condition that the defendant consent to an increase in the verdict by a sum equal to the amount of such expenses as claimed in the petition, the presumption being that plaintiff could have proved the full amount of the expenses claimed to have been incurred had he been permitted so to do.
2. Compensatory damages for injuries, not willfully inflicted, which have resulted in hopeless insanity with no periods of lucidity which would permit the victim to appreciate or enjoy the fact of ownership and control of money and its purchasing power, should be in an amount sufficient to provide the victim with the necessities of life together with such luxuries as she is still able to enjoy, but should not include any award for pain, suffering or mental anguish, or for causing the insanity, as such.

Victor Abraham and Thos. L. Michie, for the motion.

H. K. Rogers, contra.

HICKENLOOPER, J.

Heard on motion for a new trial.

Plaintiff's ward in the above entitled case was injured by the derailment of one of the defendant's cars upon which such ward was a passenger.

It was alleged in the petition, and proof was offered to sustain the allegations, that the physical injuries received by the plaintiff's ward, especially the fright and horror which attended

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the receipt of these physical injuries, resulted in causing such ward to become insane requiring her incarnation in a sanatorium.

The trial resulted in a verdict on behalf of the plaintiff for \$6,350. A motion is now made by the plaintiff that this verdict be set aside and a new trial granted for the reason that the sum is inadequate and for errors alleged to have been committed in the charge of the court. ✓

Two grounds are especially urged by the plaintiff as constituting error in the charge of the court and in the exclusion of evidence. It appeared without dispute that all expenses of the plaintiff's ward's illness prior to the appointment of the plaintiff as guardian were voluntarily defrayed by the plaintiff and without creating any legal obligation upon the part of his ward and sister to reimburse him. The court, upon the motion of the defendant, ruled that such voluntary payments by the plaintiff as brother of his now ward, and not as her guardian, could not be recovered in this action. In so ruling the court clearly committed error under the rule laid down by the cases of *Klein v. Thompson*, 19 O. S. 569, 572, and *Ohliger v. City of Toledo*, 20 C. C. 142, 160.

The error on the part of the court is, however, susceptible of correction at the present time, at least as far as prejudicial effect upon the amount of the verdict is concerned, provided the defendant consents thereto. In other words, if the granting of a new trial upon this motion be made conditional upon the defendant refusing to file herein a written consent to the increase of the verdict in the total amount claimed in plaintiff's petition as constituting the expenses so incurred and paid, the plaintiff will either secure a new trial or, if the defendant consents to such increase, no prejudice will result from the ruling of the court since the plaintiff could in no event recover for such expenses in excess of the maximum claim therefor in his petition. Nor can such increase be less than such maximum since there would be no obligation upon the part of the plaintiff to prove the entire amount of such damages after the court had declared its position by ruling upon several items of such expenses. It must therefore be presumed that the plaintiff could have proved the full amount of the damages claimed or a new trial granted. This

question will be again referred to in the concluding paragraph of this opinion.

- ✓ A further ground for a new trial which is strongly urged is that the charge of the court limited damages, in case the jury found that the plaintiff's ward was incurably and hopelessly insane, that is, would never have periods of such lucidity of mind as to be able to appreciate the fact of ownership and control of money, or its purchasing power, or to derive enjoyment from such ownership or control of money, to such sum as would provide the plaintiff's ward with the necessities of life and even the luxuries which she could still enjoy. In other words, in case of such incurable insanity as above defined, the damages were to be limited to such as would maintain the plaintiff's ward in comfort for the remainder of her life and provide for her all pleasures and luxuries which she could appreciate.

It must be assumed at the inception of our consideration of this subject that the jury found the plaintiff's ward to be so hopelessly and incurably insane, for otherwise the charge upon such point could not have operated to her prejudice in the amount of the verdict. We come, therefore, to the consideration of whether the jury may allow damages "for causing insanity," as such, in addition to the expenses of maintenance, where the beneficiary of such award is not now and never would be able to comprehend the fact of possession, to enjoy the results of such ownership or to derive any benefit, in mind or body, from such an award. This leads us directly to a consideration of the nature of compensatory damages.

We are not unaware of the opinions entertained by some eminent legal authorities to the effect that compensation can properly include a sum awarded for the purpose of punishment and its deterring effect upon the commission of similar torts in the future. But the law is well established in this state that in a case of negligence, such as this, compensatory and compensatory damages only may be awarded; nor can such compensatory damages in Ohio include any award as punitive damages, unless express malice, hatred or ill-will is shown. We revert therefore to a consideration of just what may be included within the term compensation.

It is ordinarily permitted that a jury may award a money judgment as compensation for pain and suffering and for causing injury as such, and the assessment of such damages is a matter solely for the determination of the jury because there is no standard by which pain or suffering or physical injury may be measured. Such pain and suffering is not susceptible of exact valuation and the court therefore treats the award of such damages as peculiarly within the province of the jury. But in the last analysis it is evident that money does not and can not compensate for pain or suffering or physical injury. An award of money damages can in no sense make the plaintiff whole, nor undo the suffering which has been undergone. Money can in no sense be considered an equivalent for pain and suffering.

The theory of money compensation for pain and suffering and physical injury must therefore be founded upon the fact that a money judgment operates to afford the plaintiff feelings of satisfaction, pleasure or gratification which, in the eyes of the law, will operate to offset the pain which has been undergone. In other words, the possession, control, ownership and purchasing power of money is deemed to afford the plaintiff the power of gratifying other desires and of pursuing happiness, and of resulting in feelings of contentment or of an otherwise pleasurable nature. It is this feeling of contentment and this power of satisfying desires or securing pleasure which, in the nature of things, can constitute the only compensation of a money judgment. Money, as such, is not, and can not constitute, such compensation in the real sense of the word. Further, it is this balance which the jury is presumed to strike, the balance between the pleasures and happiness to be derived from the ownership, possession, control and purchasing power of money, and the non-pleasurable sensations of pain, suffering and physical injury. If therefore we assume, in a case of negligence where compensation only can be awarded, that the plaintiff is found by the jury absolutely and forever to lack any ability to appreciate either the fact of ownership, possession and control of money, or the pleasures which are to be derived therefrom, and we further presume that an award has been made covering all expenses of illness and comforts for the remainder of the plaintiff's life, it is

impossible for the court to conceive why the jury should be permitted in assessing damages, that is in striking the balance above mentioned, to include any sum for pain or suffering, or causing insanity as such, for the reason that no true compensation could be derived from such an award.

It is further to be remarked that in the event such an award were made, as we have just been discussing, to that amount the judgment would redound solely to the benefit of the plaintiff's next of kin. Presumably it would be held intact and accumulate until the plaintiff's death when it would pass to her next of kin. This presumption is founded upon the fact that the award permitted by the court and made by the jury must be held to include all expenses and comforts for the plaintiff for the remainder of her life, thus making it absolutely unnecessary to draw upon any sum which might be allowed for pain or suffering. "Compensation" therefore would not in any way benefit the plaintiff, assuming her to be incurably insane, but would benefit only her next of kin who are not entitled to recover.

For the above reasons the court feels that counsel for the plaintiff have no just cause for complaint. It is even to be doubted whether the charge was not too favorable to the plaintiff under the theory of the cases of *Scheffer v. Railroad Co.*, 105 U. S. 249, and *Haile's Curator v. Texas & Pacific Railroad Co.*, 60 Fed. 557 (C.C.A.) in which it is held that insanity is too remote to be considered the subject of damage in a negligence case, upon the principle that the defendant can be held liable only for the probable results of his negligence.

Upon the first ground discussed in this opinion it is therefore held that unless the defendant file in this cause, within ten days, its written consent to an increase in the amount of this verdict, and the judgment to be rendered thereon, in the sum of \$3,000, thus bringing such verdict to the sum of \$9,350, a new trial will be granted, otherwise the motion for a new trial will be overruled.

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Born v. Brewing Co.

WAIVER OF RIGHT TO SUE FOR TORT.

Common Pleas Court of Hamilton County.

CHARLES BORN ET AL V. THE JOHN HAUCK BREWING COMPANY.

Decided, February 4, 1919.

Actions—Right to Sue for Tort—Lost by Entering Into an Agreement for Reparation—Automobile Damaged in a Collision—Agreement to Restore it to its Former Condition—Failure of Machine to Run After Being Repaired—Remedy of Owner.

1. Where damages are claimed to an automobile by reason of the negligent operation of another machine, and the owner of the injured machine agrees to settle and adjust his claim if such repairs are made as have been necessitated by the accident, he thereby waives his right to bring an action for the tort, and such an action having been brought it is not error to instruct a verdict for the defendant.
2. The fact that the machine could not be operated after being repaired does not release the owner from his agreement, but changes the cause of action in his favor, if any exists, from one for tort to one for breach of contract.

Thos. L. Michie, for plaintiff in error.

Harmon, Colston Goldsmith & Hoadly and *Oscar Stoehr*, contra.

GEOGHEGAN, J.

This cause comes into this court on error to the municipal court of Cincinnati.

The only ground of error urged in this court is based upon the action of the trial judge in instructing a verdict for the defendant at the close of the evidence offered by the plaintiffs.

The bill of particulars filed in the court below sets forth, among other facts, that a certain automobile belonging to plaintiffs was, through the negligence of a servant of the defendant engaged in the operation of a motor truck, damaged and wholly destroyed, and damages are sought for the value of the machine, a certain amount of storage, and the deprivation to the plaintiffs of the use of the automobile for a period of three months.

The defense principally relied upon by the defendant below was that the plaintiffs and defendant agreed upon an adjustment or settlement of the claim for damages, in this, to-wit: That the plaintiffs were to have the automobile repaired and that the defendant was to pay the cost of repairs.

An examination of the evidence offered by the plaintiffs bears out this contention of the defendant.

After the collision, the plaintiffs sought the agents of the defendant and were told to have the automobile repaired. Acting upon this instruction, they placed the automobile in the hands of the Citizens Motor Car Company and received from that company a statement of the amount of damage with the agreement to repair same for \$127.25. However, plaintiffs were informed by the agent of the Citizens Motor Car Company that they would not start the repairs until they had received notification from the John Hauck Brewing Company, defendant below, that they would guarantee the payment of the amount fixed for these repairs. The plaintiffs thereupon took the written statement of the repairs necessary, together with the contract price for same, to the John Hauck Brewing Company, where the same was signed by the agent of the brewing company and the agreement by the brewing company to pay for the repairs confirmed. After some delay these repairs were made and the automobile taken from the shop. The automobile would not run and the plaintiffs brought an action to recover as hereinbefore set out.

While no statement appears in the record as to the reasons actuating the trial judge in instructing a verdict upon the close of plaintiff's evidence, it is clear that he was right in his action.

The plaintiffs having agreed to settle and adjust this claim for the cost of the repairs, waived their right to bring an action for the tort. If, as counsel for plaintiffs in error contends, the agreement of the defendant in error was to repair the automobile so that it would be in good running order, then their action should have been for a breach of this contract and not for the tort.

The judgment of the municipal court will therefore be affirmed.

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Machinery Co. v. Machinery Co.

**WARRANTY EXPRESS AND IMPLIED UNDER WRITTEN
CONTRACTS OF SALE.**

Common Pleas Court for Montgomery County.

INTERNATIONAL CLAY MACHINERY COMPANY v. OLIVER
MACHINERY COMPANY.

Decided, December 26, 1918.

Sales—Written Representations of Fitness for a Particular Use Made by Seller Previous to Signing Written Contract—Not a Basis for Claiming Express Warranty When Not Reiterated in the Written Contract—Express and Implied Warranty Under the Ohio Code and Common Law.

1. When machinery is sold by written contract without express warranty as to fitness for a particular and special purpose being incorporated therein, such express warranty can not be established by proof of the representations of a letter sent by the seller to the buyer prior to the execution of such written contract.
2. When opportunity is given for the examination of such machinery and it is inspected before purchase by the buyer or his agent and upon such inspection changes and improvements are suggested by the inspector and made by the seller, the purchaser is not entitled to the benefit of implied warranty of fitness for use for the purpose intended.

SNEDIKER, J.

This case is before the court on the merits. The plaintiff, a corporation located in this city, complains in its petition that on or about the 21st day of December, 1915, it entered into a written contract with the defendant whereby the plaintiff agreed to purchase and the defendant agreed to sell to the plaintiff thirteen turret lathes, at the price of nine hundred and fifty dollars for each lathe, delivered by the defendant f. o. b. cars at the city of Grand Rapids, Michigan.

The plaintiff contends that this contract was based upon and embraced as part of the terms and provisions thereof certain written and printed plans and specifications prepared by the said defendant of the said lathes, together with statements and

representations made by the defendant in its written correspondence with the plaintiff, and also in certain oral communications by agents of the defendants with agents of the plaintiff. The deliveries, the plaintiff says were to have been made by the defendant, one lathe within two weeks from the date of the contract, six within six weeks from the date of the contract and the remainder within seven weeks from the date of the contract. Plaintiff's contention is that it specifically advised the defendant that it desired to purchase lathes which would turn three-inch Russian shrapnel or shells as it had immediate prospect of a large and favorable order for the making of such shrapnel and shells on a highly remunerative basis; that in compliance with the specifications prepared by the defendant and upon which the contract was based, the lathes were represented as being designed and suitable for turning three-inch Russian shells, and that representations were made by the defendant in its correspondence that it, the defendant, contemplated the making of shells from forges itself, and that the style, type and kind of turret lathe contracted for by the plaintiff had been especially designed for its own use in turning three-inch Russian shrapnel.

The plaintiff says that the entire purpose and object of its contract with the defendant, so far as this plaintiff is concerned, was to enable it to procure turret lathes which would be proper and suitable for the turning of said shells; that this the defendant knew and understood throughout all the negotiations leading up to and forming a part of said contract. Certain changes were, as plaintiff states, made in the spindles of the lathes for the purpose of making them fully conform to and answer the objects and purposes of the plaintiff. The plaintiff then complains of certain delays in deliveries; that upon installation of the lathes at its plant they failed and refused to do and perform the work for which they were designed and which they were represented by the defendant as being capable of, that is, *the turning out of three-inch Russian shrapnel*.

The plaintiff complains that the lathes so constructed and shipped by the defendant were defective in design and mechanism in that the turret holes were out of line, turret stops which were inserted in the turret posts did not fit therein suitably,

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causing considerable play between them and corresponding vibration, and head gears were improperly constructed, and that there were other objectionable conditions; all of which necessitated changes and improvements which this plaintiff was compelled to make, and plaintiff sets forth an itemized statement thereof which, in all, total \$1,419.66.

The plaintiff paid for eleven of the lathes which have been shipped to it and placed in its factory. The other two lathes were sent by the defendant, but have been subjected to an attachment by the plaintiff.

As a second cause of action the plaintiff claims delay in the manufacture of the three-inch Russian shrapnel, on account of the defect claimed in its first cause of action, and that as a result thereof it was unable to fill its contract which it had made with other party and which provided for the manufacture by the plaintiff of one hundred thousand Russian shrapnel at a net profit of twenty cents on each shell; that because of these conditions and circumstances it lost the contract, and its total loss and damage on account thereof was twenty thousand dollars, and plaintiff asks recovery in the sum of \$21,419.66.

By way of answer, the defendant says that it did contract in writing with the plaintiff to manufacture and sell plaintiff thirteen 47-T turret lathes according to description set out in the contract and bulletin of specifications attached thereto; that this contract bearing date of December 20, 1915, and this bulletin of specifications embraced all the terms, conditions and understandings of every kind between the plaintiff and the defendant; that delays in delivery were caused by the action of the plaintiff; that the lathes made and delivered by it to the plaintiff were in all respects according to contract and specifications, and were of the best material and workmanship, and were properly constructed and built in all details and parts; that the plaintiff's claim on account of expenses in changing the lathes and adding parts is not proper against it, the defendant, as they are for parts that were not set forth in the contract and specifications, but are separate and apart therefrom and therefore can not be charged to it; that defendant has fulfilled its contract with the plaintiff in every way except the deliveries

which were delayed by the plaintiff's action as aforesaid, and the defendant denies each and every allegation in the plaintiff's two causes of action not expressly herein admitted to be true.

Plaintiff's reply is a denial of all defendant's allegations which are not consistent with its petition.

From the evidence it appeared that this plaintiff, contemplating the construction of three-inch Russian shrapnel, communicated with the defendant company as to the kind and character of the lathes made by it by letter of December 3, 1915, as follows:

"Oliver Machinery Co.,
Grand Rapids, Mich.

Gentlemen:

We are in the market for five to ten lathes for turning three-inch Russian shrapnel. Have you anything to offer for quick delivery?

Very truly yours,
CHAS W. RAYMOND,
Purchasing Agent."

In response to that communication, under date of December 4, 1915, the defendant wrote to the plaintiff the following:

"December 4, 1915.

"International Clay Machinery Company,
Dayton, Ohio.

Gentlemen:

We are in receipt of your favor of December 3d, stating that you are in the market for five or ten lathes for turning three-inch Russian shrapnel, and we are enclosing herewith photograph and circular of our 16-inch very heavy duty engine and turret lathe. Our turret lathe is especially designed for turning three-inch Russian shrapnel, although the engine lathe is a general purpose machine and may be used on all classes of work. * * *

(Signed) Oliver Machinery Company."

An illustration and circular of No. 16 heavy duty engine and turret lathe is found in plaintiff's Exhibit 3 and as part of that circular certain specifications are found relating to the construction, material and efficiency of the lathe.

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Thereafter, on December the 17th, 1915, the following telegram passed to the defendant company from the plaintiff company:

“Oliver Machinery Company, Grand Rapids.

Do you guarantee material workmanship suitable for three-inch shrapnel inside turning? If so, will have a man to inspect them Monday. Answer.”

And to this telegram, on the same date, a reply came from the defendant company to the plaintiff company:

“International Clay Machinery Company, Dayton, Ohio.

We guarantee material and workmanship first class. We consider the machine suited to your work, but you must be the judge of suitability.

Oliver Machinery Company.”

Thereafter, on December 20, 1915, the lathes were inspected by a representative of the plaintiff company for the purpose of determining whether or not they were of a kind and character which would turn three-inch Russian shrapnel. Upon his inspection this agent of the plaintiff company suggested certain changes in the lathe with the object of making it stronger and more fit for use in the heavy work to which it was intended to be subjected in turning the shrapnel, and advised defendant that plaintiff would take thirteen, and under date of December 20, 1915, this plaintiff and this defendant entered into a contract in writing in the following language:

“December 20th, 1915.

Contract for Turret Lathes.

The International Clay Machinery Company of Dayton, Ohio, hereby agrees to purchase and the Oliver Machinery Company of Grand Rapids agrees to sell thirteen (13) No. 47-T turret lathes as follows:

Specifications for turret lathe as per Bulletin No. 47-T, dated 12-13-'15, copy of which is attached hereto. Machine is to have spindle four (4) inches diameter with 2 5/8-inch hole and with two hardened steel thrust collars. Price of each f. o. b. cars Grand Rapids, Mich., nine hundred and fifty dollars (\$950).

Terms—sight draft attached to bill of lading, subject to the clause at the bottom of our letter-head sheet, delivery as follows:

One (1) as near to two (2) weeks from date as seller's works will permit.

Six (6) in six (6) weeks and

Six (6) in seven (7) weeks.

All thirteen (13) to be delivered f. o. b. cars Grand Rapids seven (7) weeks from date of receipt of order.

Earlier shipment acceptable to purchaser. (Signed)

Oliver Machinery Company,

by J. W. Oliver, President.

International Clay Machinery Company,

by J. C. Brannock."

And thereupon the defendant entered upon the performance of its contract in the construction of the lathes.

It appears that after the delivery of the lathes, in its attempt to make the Russian shrapnel, this plaintiff had difficulty in the use of the lathe, which resulted in the delay, in failure of production, and eventually in the loss of contract to construct shells. There passed between the parties numerous communications—complaints on the part of the plaintiff and explanations on the part of the defendant; changes were made in the machines, both with and without the advice of the defendant; delays were occasioned in deliveries with respect to which each party claims the other was at fault.

At no time did the plaintiff company in its communications to the defendant, after certain of the lathes had been received by it in its factory and put in operation, absolutely reject the lathes, refuse to accept them, or offer to return them to the defendant. The whole scope of its correspondence with respect to defects was that it was dissatisfied in certain particulars; that it claimed that certain changes were necessary, stating the kind and character of such changes and expense incident thereto; and that it asked the advice and help of this defendant in such alterations. The plaintiff did write under date of February 2, 1916, to the effect that, on account of the turret holes being 1-16 out of line and on account of the necessity of its reboring the holes, it expected to charge back the expense to the defendant. And in that letter it says:

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"Now, we also wish to impress on your mind the necessity of giving this particular point attention on the lathes that you are still to construct. To be candid with you, should we receive twelve additional lathes from you and find the turret holes 1-16 out of line, we would be very much inclined to reject them altogether."

In other words, there was not up to March 22, 1916, the date of the bringing of this action, and there is not claimed in this case any rescinder by the plaintiff of its contract with the defendant. The contract is recognized, and on account of their differences this action was brought by the plaintiff to recover under what it regards as the warranties, express and implied, of the defendant as to the fitness for use of the lathes in the construction of Russian shrapnel and further, on account of the implied warranty which attaches, of the fitness of the lathes with respect to material and workmanship. It is not necessary, therefore, for us to consider and apply to the evidence before us the rules of law relating to a refusal to accept or to a rescinder.

The contention of the plaintiff is, as we have said, that not only the written contract of December 20, 1915, shall be looked to in determining as to the duty of the defendant company, but also in connection therewith all conversations and written communications made by the defendant company to plaintiff or its representatives; and in so doing it claims that it is entitled to the benefit of an express warranty as recited in the letter of December 4, 1915: "Our turret lathe is especially designed for turning three-inch Russian shrapnel." If the contract as between the plaintiff and defendant had been made solely by correspondence and the letter of December 4th was a part thereof, even though it antedated the final order for the lathe, then, under the rule laid down in the 39 Ohio State, p. 671, this plaintiff would be entitled to the benefit of what is contained in that letter. But after that letter was written and after certain other oral and written representations were made by the defendant company, the contract of December 20, 1915, was entered into, and nowhere in that contract is found any express warranty with respect to the fitness of the lathes there bought and sold for the turning of three-inch Russian shrapnel.

In the case of *Curran & Wolf v. Houser, Kramer & Company*, 6 Ohio Nisi Prius Reports, the Superior Court of Cincinnati, ex-President Taft deciding the case, says:

"It has sometimes been held that as the warranty is a collateral undertaking for the main contract, parol evidence is admissible to establish warranty, though the terms of the sale are in writing, but by the great weight of authority the rule is that, where parties reduce their contract to writing, no additional warranty can be engrafted on it by parol or the other writings not a part of the former contract.

"Then in *Randall & Stead v. J. & P. Rhodes*, 1 Curtis, C. C. R., 90, the action was on a warranty in the sale of a ship that it was of white oak. It was sought to prove the warranty by the letter from the defendant to the plaintiff containing representation that the ship was of white oak. Subsequent to the letter a written contract of sale was signed, which contained no reference to the wood of which the vessel was made. Mr. Justice Wood held that the statement in the letter must be regarded merely as a representation and not a warranty and gave no right of action for a breach." (Here follow authorities quoted by Judge Taft. He then goes on):

"In the case of *Prédeaux v. Bennett*, 1 C. B. N. S., 613, a case very like the one at bar in more respects than this, it was held that 'no warranty grew out of a circular sent to the purchaser on which he relied in sending in his order, although it appeared that he had no other knowledge of the article bought.' It follows, therefore, that no warranty is established either by the parol statement of plaintiff's agent or by the circular handed by him to the defendant."

This language we regard as stating the law, and we may not here find that we are entitled to consider the letter of December 4th and subsequent communications before December 20th as express warranties to which the plaintiff is entitled under its contract.

We now come to the question as to whether or not the plaintiff is entitled to the benefit of the implied warranty of fitness for the use for which the lathes were intended; that is, as stated by the plaintiff in its petition, the turning out of three-inch Russian shrapnel or shell. As before stated, prior to the making of the contract upon which the plaintiff sues, a special representative of the plaintiff went to the factory of the defendant and

there inspected the lathe in question, and directed the defendant company to make such changes as in his judgment would better perfect the machine for the purposes of the plaintiff in turning out shells.

The rule under these conditions is laid down by the court in the 71 Maryland, p. 116, in these words:

“The doctrine of implied warranty has not, it seems to us, any application to the facts in this case. Where the buyer has an opportunity of examining the thing sold, there is no implied warranty in the absence of fraud or express warranty, that it shall be fit for the purpose for which it was bought. In such cases the rule of *caveat emptor* applies, by which is meant that unless the buyer sees fit to require a warranty he takes upon himself the risk as to quality.”

In 41 Hun, at page 227, the court say in the opinion:

“In the case at hand the plaintiff’s agent, by it selected for the express purpose of making suitable and proper inspection, examined all the pans and the enameling thereof and approved the same. If he was incompetent, if he was negligent, if he was inattentive, the responsibility for such neglect, inattention or want of capacity should fall upon plaintiff.”

The court refers to the language of Davis, P. J., in *McParlan v. Boynton*, 8 Hun, 453, where the parties stipulated that articles to be manufactured should be of a particular kind and quality, and at the same time stipulated that they should be tested by a person selected by the purchaser before delivery to ascertain whether they are of the specified kind and quality, and such test is in fact made by him, and the goods are thereupon delivered and accepted:

“The defendant had the privilege of selecting any person he chose. It was both his interest and duty to select a competent and skillful man. If he failed to do that, it was his misfortune or neglect.”

In the 4th Fed. cases, at p. 1049, we find the syllabus in *Calhoun v. Vechio et al* to be:

“Action to recover the stipulated price of a quantity of looking-glass, which the plaintiff advertised as white glass of a

superior quality, and which the defendants purchased after having particularly examined the same, signing the agreement stating the purchase and price to be paid, on taking the glass away. On the following day one of the defendants returned, examined the glass and said it was an inferior quality, and refused to comply with the agreement of the preceding day. The glass was in fact of a very inferior quality. The court held that the defendant having examined the glass and given the agreement to purchase it, he could not afterwards claim to be relieved from his bargain by the discovery that the quality of the glass was inferior and that it was not worth the price agreed to be paid for it."

"2. The statement of the quality of the glass in the advertisement did not amount to a warranty inasmuch as the defendants did not rely upon the advertisement, but on their judgment formed after an examination."

See also 10 Wall., 383.

In the 53 N. Y., at p. 519, the court say:

"But in the absence of fraud or latent defects, an acceptance of the article sold upon an executory contract, after on opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party can not, under such circumstances, retain the property and afterwards sue or counterclaim for damages under the pretense that it was not of the character and quality or description called for by the agreement."

In 2nd Story on Contracts, Section 1071, *et seq.*, the author lays down the rule that:

"If the work is open to the inspection of the buyer and the opportunities of forming a judgment of its sufficiency are open to the buyer as well as the seller, the rule of *caveat emptor* applies."

As hearing upon the question here presented, we may quote Section 8395 of the General Code of Ohio:

"Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

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"1. When the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required and it appears that *the buyer relies on the seller's skill or judgment*, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

"3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

It will be seen from the reading of these portions of this section that the codification of the law of sales in Ohio complies with the common law with respect to implied warranty under the conditions here presented.

Of course, if there had been an express warranty here, the examination of the machine made by plaintiff's agent on its behalf and his suggestion with reference to the changes would not have avoided such express warranty. Under those circumstances plaintiff still would be entitled to claim and rely upon the warranty so expressly made. We find that plaintiff is entitled neither to express nor implied warranty in respect to the fitness of these lathes for the turning out of Russian shrapnel.

There is, as we have said, complaint in the plaintiff's petition of faulty construction in the lathes in that the turret holes were out of line; the turret stops which were inserted in the turret posts did not fit therein suitably, causing a considerable play between them and a corresponding vibration, and head gears were improperly constructed and other objectionable conditions existed. The specifications of the lathe as found in the circular referred to in the contract are sufficient to entitle the plaintiff to complain had it made its claim good with respect to such defects. Under the rule laid down by the Supreme Court in Ohio in the 11 O. S. at p. 48, in the case of *James Rogers & Co. v. Niles & Co.*, there is in a sale of the character here in question an implied stipulation in the contract that the machinery should be free from all defects of material and workmanship, whether latent or otherwise, as would render them unfit for the usual purposes of such a machine.

Of course, as to the allegations of its petition, the burden of proof is on the plaintiff. In the conflict of testimony which was

presented to us, we can not find that the plaintiff has so far sustained that burden as to entitle it to recover on account of such implied warranty as to defects in workmanship and material. The change in the gears for which the plaintiff makes claim for \$830.40 was an after-thought and was designed by the plaintiff for the purpose of giving greater power in operation of the tool, and the expense incident to such change can not be brought within the terms of the contract of December 20, 1915, which we have already found to be the real contract between the parties.

With respect to the reboring and the other changes that were made on the turrets and other parts of the lathe, the evidence indicated, and we think clearly showed, that the reboring was for the purpose of inserting a larger sized tool than that which the lathe, as manufactured, would carry. The interference which resulted by communications of the plaintiff to the defendant and which prevented the manufacture and shipment of the lathes at the time specified in the contract was instrumental in an increased cost of freight and drayage for which this defendant, as we view it, can not be said to be so far solely responsible as to entitle the plaintiff to recover. In regard to shipments, we can not find that, under all the conditions, the defendant violated its contract.

On the whole, therefore, our finding is for the defendant and against the plaintiff upon the plaintiff's petition.

And coming now to consider the cross-petition of the defendant and having found that the plaintiff is not entitled to recover on the allegations in its petition, and finding that the two 47-T turret lathes heretofore shipped to the plaintiff by the defendant are now in its possession, and that defendant makes claim to the contract price therefor, thus consenting to their retention by the plaintiff and recognizing the plaintiff's property right therein, we further find that the defendant is entitled to recover the agreed price thereof of \$950 each, with interest as claimed in its cross-petition.

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APPROPRIATION OF FARES BY A STREET RAILWAY CONDUCTOR.

Common Pleas Court of Summit County.

DAVID STALNAKER v. STATE OF OHIO.

Decided, March 28, 1919.

*Criminal Law—Conversion of Street Railway Fares by a Conductor—
Does not Constitute Embezzlement, When.*

Where the rules of a street railway provide that no conductor shall deposit a fare for a passenger in the fare box, a prosecution for embezzlement does not lie against a conductor who is accused of receiving fares which he did not deposit in the box but appropriated to his own use.

McCLURE, J.

The plaintiff in error, David Stalnaker, was on January 30, 1918, tried and convicted in the police court of the city of Akron for the offense of embezzlement, the charge having been brought against him by the Northern Ohio Traction & Light Co., in whose employ as a street-car conductor he was during the month of January, 1918; that he did unlawfully embezzle and convert to his own use, as the agent of said company, certain money of the amount and value of twenty dollars and eighty cents of the personal property of the said Northern Ohio Traction & Light Company.

The case is now before this court on error, and several grounds are alleged in the petition, one of which is "that the court erred in overruling the motion of the defendant for an acquittal of the defendant, after plaintiff had rested its case.

The state offered evidence on the trial of the case for the purpose of showing that the accused, who it is conceded was employed by the traction company in the capacity of a conductor on its street-cars, had received money from passengers for the purpose of making change, and, instead of depositing the correct fare of five cents in the fare-box, would deposit a penny only, retaining and appropriating the balance of four cents to his own use.

It is the contention of counsel for plaintiff in error that, even though it were conceded that the above state of facts were true,

the defendant could not be lawfully convicted of the offense of embezzlement under the testimony introduced by the state, for the reason that it is conclusively shown by the testimony of the witness Brown, a division superintendent of the traction company, that the rules of said company governing the conduct of its employees expressly provide that no conductor shall deposit the fare of a passenger, his sole duty being to make the proper change for the passenger, but in no case to deposit the fare in the fare-box.

The offense of embezzlement, as related to the present case, is defined by Section 13467, General Code, in the following language: "Whoever being an * * * servant or employee of a person * * * embeszzles or converts to his own use * * * any thing of value which shall come into his possession by virtue of his * * * employment if the total value of the property embezzled * * * is thirty-four dollars or more," shall be punished as therein provided.

The essential elements of the offense, as defined by Underhill on Criminal Evidence, are as follows: (1) that the accused was the agent of the person or corporation, and that he by the terms of his employment was charged with receiving the money or property of his principal; (2) that he did in fact receive such money or property; (3) that he received it in the course of his employment; and (4) that knowing it was not his own, converted it to his own use, or the use of some third person not the true owner.

It is evident, therefore, that unless it can be established that the defendant unlawfully converted to his own use money of the Northern Ohio Traction and Light Company which came to his hands in the course of his employment as the agent of said company, he can not be guilty of the offense of embezzlement.

The testimony of Charles L. Brown, a division superintendent of the Northern Ohio Traction & Light Company, in relation to the scope of the employment of the defendant in the receipt of fares for the company is as follows:

Q. What is the rule with which your company governs such an employee as this with respect to accepting fares from customers, I suppose you have a printed rule?

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A. They are not allowed to accept fares from passengers on the car.

Q. What are their instructions?

A. The passenger is supposed to deposit his own fare in the box.

Q. Then the employee, as I understand it, it is not his duty to receive any money at all?

A. As a rule, no. Not his duty to deposit any fares. Receiving money is a different question.

Q. This man is employed by your as a conductor?

A. Yes.

Q. Was it or not a part of his duty in the course of his employment to receive fares from passengers?

A. Receive fares?

Q. Accept fares from your passengers?

A. The rule is I'll say that in cases of crowded cars where passengers can not get to the fare-boxes they have been taking the fares and depositing them in the box.

Q. What is your rule?

A. The rule is that no conductor shall deposit a fare for the passengers.

Q. Nor receive any fare for the passengers?

A. Absolutely.

It appears further from the testimony of Mr. Brown that when the employee had been working for the company a sufficient length of time, so that his wages would cover the amount furnished him, he was supplied with change to the extent of ten or fifteen dollars, and this was done in the case of the defendant. This change was intended for the accommodation of passengers who might not have the exact fare, and there is no claim that this fund, or any part of it, was embezzled by the defendant.

This evidence, the force of which is not altered or modified by that of any other witness, in the opinion of the court, definitely fixes the scope of the defendant's agency as an employee of the corporation, and shows beyond question that the rules of the company were framed expressly to prevent its employees from exercising any control whatever over the receipt of fares, it being quite clear that if the employee had no authority to deposit the fare he had no authority to receive it at all as the property of the company.

If the passenger undertook to delegate to the conductor the duty which rested upon him of depositing his fare in the fare-

box, while it might constitute the conductor the agent of the passenger, it certainly could not clothe him with an authority as an agent of the company, which authority was expressly withheld under the rules governing the scope of his employment.

The money which the passenger paid for his transportation did not acquire the character of property belonging to the company until it was actually deposited in the fare-box, and as to this we have seen the defendant owed no duty to the company under his employment which involved any control or dominion whatever over the fare itself, but only that the passenger should be required to deposit it or should be ejected from the car if he neglected or refused to do so.

In Wilson's Criminal Code, page 205, this rule is laid down:

"Should a person employed take and convert to his own use property of his employer, which does not come into his possession, care or custody by virtue of his position or employment, and which he has no right or authority to have, this would be larceny as much as though unlawfully taken from another person."

From the foregoing considerations it necessarily appears that there was a failure to establish the guilt of the defendant of the crime of embezzlement, and, since there was no count for larceny in the affidavit upon which he was tried, it became the duty of the court to sustain the motion of the defendant for an acquittal at the conclusion of the evidence of the state.

This conclusion renders it unnecessary to examine the other ground of error, namely, the admission upon the trial of evidence of an extra judicial confession alleged to have been made by the defendant. It would appear, however, from an examination of the case of *State v. Maranda*, cited by counsel upon both sides of this case, that under the rule therein announced it would be impossible to predicate error in the admission of evidence of an extra judicial confession in a case where the state had introduced any evidence whatsoever tending to prove any one of the elements of the crime charged.

The judgment of conviction entered in the police court is reversed, at the cost of defendant in error, and the plaintiff in error, defendant below, is discharged. Exception for defendant in error.

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COMPENSATION FOR SERVICES RENDERED IN BEHALF OF
A PUBLIC TRUST.

Superior Court of Cincinnati.

TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY V. WASHINGTON T. PORTER.

Decided, November 18, 1918.

Construction of Contract for Services of Attorney—Fixing of Compensation by Trustees After Rendition of Services Contrary to Public Policy—Effect on Public Interest to be Tested by Evil Tendencies Rather than the Actual Injury Suffered—Interpretation of Contract from Conduct of the Parties—Value of Attorney's Services in Appropriating Property More than One Million Dollars in Value.

1. Where an attorney at law is employed by a board of trustees of a public trust at a fixed amount per month under a resolution "subject to the will and pleasure of the board both as to the term of service and rate of compensation," the board may terminate the employment at any time, or continue the employment and change the rate of compensation. If the board changes the rate of compensation, it is incumbent on the part of the board of trustees to give expression to its will and pleasure by a resolution or order equally formal and equally well authenticated and made *before* any services are rendered under the changed rate.
2. Public policy forbids public officials definitely fixing a certain sum to be paid for services to be rendered to the public and at the same time reserving to themselves the arbitrary power to add to the sum named in a contract *after* the services are rendered.
3. Compensation for services rendered by an attorney at law to a public trust must be moderate, more so perhaps than if rendered to an individual or private concern. The measure of such value is dependent upon the onerous and exacting character and nature of such services, their amount, the amount of money involved, the time actually consumed, the skill and ability required and displayed, the responsibility involved, actual trial work and negotiations, if any, apart therefrom, and the beneficial results to such trust due directly to such service.

Harmon, Colston, Goldsmith & Hoadly and John Weld Peck,
for plaintiffs.

Rufus B. Smith, contra.

GUSWEILER, J.

This is a proceeding brought in this court by petition filed January 23, 1907, by the Trustees of the Cincinnati Southern Railway against Washington T. Porter, in which the plaintiff board seeks a decree fixing the amount of compensation due the defendant for certain legal services rendered to them as such trustees. The plaintiffs prayed that, on the payment of the amount so fixed, the defendant be required to release and discharge the plaintiffs from all claims and demands by reason of said services. The case was tried on its merits at that time by a learned former judge of this court, who made a finding which was sustained and approved by the circuit court of this district and was then taken to the Supreme Court, which court of last resort set aside the findings of the two lower courts and remanded the case back to this court for further proceedings.

The Supreme Court found it to be error on the part of the courts below to hold that the board of trustees had conclusive right under the resolution of 1894 to determine the question of additional compensation "*after*" the work was done. It held that the defendant should have been permitted to show, if he could have done so by legal testimony, that the services in question were not rendered pursuant to the resolution in question, and, if they were not, he should have been permitted to prove the value of those services.

Thus the cause has come on to be heard on these issues by this court, and by agreement of counsel it was heard and argued orally for several days, the printed record, pleadings, briefs, etc., being submitted in lieu of witnesses being heard. After long and tedious examination and careful inspection of the printed records and printed briefs, and careful and serious consideration thereof and of able argument by counsel, the trial court approaches the issue as follows:

1. Does the evidence in the trial of this case prove that the legal services rendered by the defendant were rendered under the resolution of 1894?

2. If not, what is the reasonable value of said services as proven by the evidence?

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As to the first question it is necessary to consider in detail some of the history of the former relations between the plaintiffs and defendant which in substance is not disputed.

The Cincinnati Southern Railway is a municipally owned railroad, but operated by a private company to which it is leased. The road was constructed under an act passed in 1869, together with certain amendatory and supplementary acts. By the act of 1869 power was given to the Superior Court of Cincinnati to appoint a board of trustees, whose duty it was to construct the road with the money raised by issues of bonds of the city authorized by different acts and aggregating \$18,300,000. In 1877 an act was passed authorizing the trustees to lease the road, and in pursuance of such authority the trustees, in 1881, leased the road to the Cincinnati, New Orleans & Texas Pacific Railway Company, and under legislation of April 23, 1898 (93 O. L., 637), the lease was modified and extended in 1902, and this company still continues as lessee to operate the road. The lease, with the subsequent modification, is fully set out in *Cincinnati v. Ferguson*, 12 Ohio Dec., 439, affirmed by the Supreme Court April 1, 1902.

In clause 9 of the lease it was covenanted that in addition to the rental, the lessee company would pay annually the sum of \$12,000 "to cover the necessary expenses devolving on said trustees in conducting their trust," and this provision remains in the subsequent modification of the lease made in 1901 under a law passed in 1898.

Notwithstanding the heavy financial burden which the city had assumed in the construction of the road, it had not provided sufficient terminals. Subsequently a plan was evolved and authorized by the act of 1898, by which the trustees were authorized to borrow \$2,500,000, to be expended in the construction of terminals, the lessee, however, to pay both the principal and interest on the bonds as they fell due. The arrangement required, however, a vote of approval by the people, which it received.

In securing these terminals it was found necessary to secure by condemnation or agreement two large tracts of valuable

property in the city of Cincinnati; one consisting of six blocks bounded by Vine street on the east, Elm street on the west, Water street on the south, and Commerce street on the north; and the other a large tract in the northwestern part of the city. The amount expended in acquiring these properties was, in round numbers, \$1,500,000, the largest amount involved in a condemnation proceeding in the history of the city, and the labor connected with the acquisition of the property was entrusted to the defendant. It is for services thus rendered that the defendant is seeking in this proceeding to have reasonable and proper compensation awarded to him, and which he contends should be twenty-five thousand dollars.

By resolution of the board passed in 1873, the defendant was appointed attorney for the board at a salary of \$600 per annum, to hold during the pleasure of the board.

In 1877 the salary was made \$100 a month, subject to the further order and pleasure of the board; and he continued to act under this last resolution until 1887, when he ceased to be an attorney of the board.

On April 7, 1894, he again accepted employment from the board of trustees under the following resolution which it passed, and this is the resolution now in dispute:

“Ordered: That W. T. Porter be and he is hereby appointed attorney for the board at a compensation of \$50 per month, subject to the will and pleasure of the board, both as to term of service and rate of compensation.”

At the time of his employment to act for the board in acquiring the terminal property under the modified lease provided for in the act of 1898, and the expense of which was to be borne by the lessee, the defendant was still acting under the resolution of 1894.

The compensation paid under the resolutions of 1873 and 1877 was paid out of the funds arising from the sale of bonds, and was part of the expenses of the construction of the road; but the compensation paid under the resolutions of 1887 and 1894 was paid out of the \$12,000 annually paid by the lessee

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“to cover the necessary expenses devolving on said trustees in conducting their trust.”

All of the money arising from the sale of the bonds had been expended, and there was no other source from which such compensation could be paid, and both the trustees and the defendant doubtless understood this fact, and that the amount of compensation provided for in the 1887 and 1894 resolutions had reference to this fund.

When the resolutions to which we will refer were passed in 1903 employing the defendant to act for the board in acquiring the terminal property, the expense of which was to be paid by the lessee company, a new fund had come into existence by reason of the act of 1898. This fund was known as the terminal fund, and all expenses, including attorneys' compensation, were to be paid out of that fund. The first resolution was passed on January 26, 1903, and reads as follows:

“Resolved, That the board of trustees of the Cincinnati Southern Railway, deeming the same necessary for said railway, hereby declare their intention of appropriating to the uses of the said railway for terminal facilities, and hereby condemn and appropriate to such public use the following described property, to-wit: (Here follows the description of six blocks of city real estate.) And the attorney of the board be and he is hereby authorized and instructed to institute the necessary proceedings and to apply to a court of competent jurisdiction in Hamilton county, Ohio, for an inquiry and assessment of the compensation to be paid to the respective owners of said property.”

Action was begun at once in the common pleas court to appropriate this property. There were 116 different pieces of property and 280 parties defendant, and the value of the property as claimed by the owners exceeded \$2,500,000.

The second resolution was passed January 28, 1903. Under it the defendant was instructed to begin proceedings to appropriate for terminal purposes in the northwestern part of the city, property owned by different persons of the approximate value of \$175,000. Action in the insolvency court was at once begun.

It is contended by counsel for the board of trustees:

That the work done by the defendant, under these resolutions of 1903, was to be paid for under the resolution of 1894.

It is contended by counsel for the defendant:

(1) That the resolution of 1894 related to services to be rendered to the board alone, and for which the board alone was to pay, its only source of payment being the \$12,000 fund.

(2) That the employment under the resolution of 1903 had reference to services to be rendered in acquiring terminal property to be paid for out of the terminal fund, which fund, while created in the first instance by issuing the bonds of the city of Cincinnati, was in reality the fund of the lessee company which paid the interest and principal of the bonds.

(3) That the resolution of 1894 would authorize the board to increase or decrease the compensation of defendant to a greater or less amount than \$50 a month, *provided* such increase or decrease were made *before* the work was done, and such increase or decrease had been agreed to by defendant, but no increase or decrease could be made *after* work had been done at the rate of \$50 a month, for the reason that the contract in force at the time the work was done would be binding upon the board, and they could not pay less than the contract price without infringing the rights of the defendant, and they could not pay more than the contract price for the reason that, being public officials, they could not give away money by paying more than their contract obligated them to pay.

(4) That there is no authority given to the board by the contract, arbitrarily, *after* work is done, to add to the \$50 a month such amount as the board saw fit. Any contract by public officials which contained such a provision would be against public policy, illegal and void, as opening the door to the perpetration of fraud by public officials in favor of favorite contractors.

(5) In view of the above stated principles and the subsequent conduct of the board and the defendant, it is apparent that both the board and the defendant understood at the time he entered upon the services called for by the resolutions of

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1903 that he was to be paid therefor such amount as the services were reasonably worth.

Now this question presents itself, did the resolution of 1894 cover services to be rendered by the defendant in acquiring property for these terminals? We are inclined and feel that there is some force in the contention of counsel for the defendant that the provision in the original lease imposing all of the expense of acquiring terminals upon the lessee company as found in clause 10 of the original lease did not include services rendered by defendant or any other counsel under the resolution of 1894, which reads as follows:

“To provide lands in the city of Cincinnati, or at other points or places on the line of said railway, for workshops, depots, and other terminal facilities and the rights of way thereto, or for the purpose of changing the location or grade, or of providing additional side tracks, or other appendages of said railway, or for other like purposes:

“It is therefore mutually covenanted and agreed by and between the parties hereto, that whenever it shall be found necessary for any of the purposes aforesaid, and the said party of the first part (the board of trustees), have the lawful power and authority to do so, they shall and will, upon the request of said party of the second part (the railroad company) at the proper cost and expense of the said second party, and without any deduction from the rents and other payments herein reserved and to be paid by said party of the second part, acquire or enter upon, take and appropriate such lands and rights as may be necessary for the purposes aforesaid.”

In 1898 an act was passed enabling the board of trustees to extend the original lease upon such terms as seemed to them proper; and also authorizing the issue of \$2,500,000 in bonds of the city by the board of trustees for the purpose of acquiring terminal facilities, provided an agreement was made with the lessee by which the principal and interest of the bonds were to be paid by the lessee by way of additional rental (93 O. L., 637).

In pursuance of the authority granted by said act, two agreements in 1902 were entered into by the board of trustees and the lessee company; the one agreement was a modification and

extension of the lease; and the other agreement provided for the issue of the terminal bonds. These agreements also provided that the lessee should have the right to determine "the location, dimensions of the real property acquired, and the plans for all structures erected and all improvements made from such funds."

The bonds to be issued were the bonds of the city of Cincinnati, which could be sold at a better price and with a lower rate of interest than bonds of the railroad could be sold for, and this was the purpose in so issuing the bonds, which nevertheless the lessee company was to pay, both principal and interest. These two agreements required for their validity that they should be approved by a popular vote, which was done. *Cincinnati v. Ferguson*, 8 N. P., 361; *Cincinnati v. Ferguson*, 12 Ohio Dec. (N. P.), 453 to 456.

The agreement for the modification and extension of the lease provided in Section 13, as follows:

"The original lease, dated October 11, 1881, is to remain in full force during the term therein granted and during the extension thereof hereby granted, except so far as the same is modified by this indenture, and the said party of the second part for itself, its successors and assigns, hereby covenants and agrees with the said party of the first part, its successors and assigns, that it will keep and perform all the covenants, stipulations and agreements thereof and of this indenture, and will not evade or violate any of the same."

Section 3 of the modification and extension of the lease provides as follows:

"That any additional track, whether additional main track or additional side track, which may be constructed by the said party of the second part, on or along the said line of railway shall be constructed on the right of way now owned or to be hereafter acquired by the parties of the first part, and become a part of the line of railway; and whenever it shall be found necessary that additional lands or rights of way be acquired for the purpose of constructing additional main or side tracks, that such additional lands or rights of way shall and may be acquired under the terms and conditions of clause 10 of said original lease, and the provisions of clause 10, of said lease are

hereby made applicable to the acquirements of lands and rights of way for such purposes."

These two clauses were also repeated in the mortgage deed subsequently made by the lessee to the trustees to secure the obligations of the lease (Sections 3 and 13 of mortgage).

Bearing in mind the original lease, the modified lease and the agreement to issue the bonds which were to be paid by the lessee, it seems apparent that it was the money of the lessee company which the defendant was spending in acquiring land for terminal facilities, as testified to by Mr. Edward Colston, counsel for the lessee company. When the defendant therefore proceeded, under the resolution of 1903, to acquire land for terminal purposes, "the cost and expense" of which were to be paid by the lessee, his services were, it would seem, necessarily to be paid by the lessee as a part of such "cost and expense." It is claimed that the amount thus far paid the defendant has been paid out of that fund, and any additional amount paid him will be paid from the same fund. It is claimed that unless some agreement was made by him as to what his compensation was to be, he was necessarily to be paid what his services were reasonably worth; and if he and the board of trustees were unable to agree as to what amount was reasonable, the question must be settled by the courts. Could it be settled against him by the mere fiat of the board of trustees?

To undertake to determine what his compensation should be for such services by referring back to the resolution of 1894 seems futile, because that resolution has no reference to such services.

It is claimed that the resolution of 1894 had no application to the services rendered by the defendant in 1903 and 1904, under the law of 1898, for the reason that in 1894 the only amount remaining in the hands of the board of trustees was \$1,984.12, and the power of the board to exercise the right of eminent domain was limited to that amount. Did the resolution of 1894 therefore contemplate and had it application to the rendering of services under the law of 1898 (not then in existence) which involved the expenditure of \$2,500,000 to be paid by the lessee company?

It appears from the testimony of the defendant in the record and also from the modified lease entered into under the law of 1898, that all of the money authorized by the different acts for the construction of the road had been expended long before 1894, except \$1,984.12.

At the time the resolution of 1894 was passed, therefore, the board of trustees probably had no power to exercise the right of appropriation of property to a greater extent than \$1,984.12.

When the resolution of 1894 was passed did the board or the defendant have in contemplation services to be rendered under an act of the Legislature to be passed four years later, by which act the board was to exercise the power to appropriate property to an amount of \$2,500,000, with money furnished by the lessee company?

Preliminary to a more direct consideration of the above proposition, we must bear in mind two general propositions of law.

(1) That in the construction of a contract the court will take into consideration all of the surrounding circumstances.

In *Chamberlain v. Painesville R. R.*, 15 O. S., 243, the court, in seeking the construction of a contract, said:

"What, then, is the intention of the parties, as therein expressed, and to be gathered from a fair construction of the language employed? In answering this question, the situation and relation of the parties to each other, the object sought to be attained and the subject-matter to which the agreement relates, are material, and, in cases like the present, we might say, indispensable aids in guiding us to the correct construction."

In *Mosier v. Parry*, 60 O. S., 388, it is declared that:

"Where the language of a contract is of doubtful import, it is proper to ascertain the circumstances which surrounded the parties at the time it was made, the object intended to be accomplished and the construction which the acts of the parties show that they gave to their agreement, in order to give proper construction to the words that they used in the instrument and to determine its legal effect."

In *Kinney, Assignee, v. Commissioners of Hamilton County*, 8 C. C. Rep., 433, syllabus 2, it is said:

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“The people as a body can only act toward one of their number in honesty and fairness, and whether a construction of a contract makes it reasonable and just, or otherwise, is a matter to be taken into consideration by a court, and such construction will be given to the agreement, if possible, as leads to justice between the parties.”

On p. 437 it is said:

“Can it be claimed that this was a contingency that was contemplated by the county at the time of making the contract? We have a right to assume that the contractor was a person of some intelligence, possibly a man of ordinary intelligence. If so, can it be supposed that he would enter into a contract of such a character?”

In *Bank v. Insurance Co.*, 83 O. S., 330, as late as 1911 our Supreme Court said:

“The courts must construe the contract as nearly as may be to effect the purposes of it, and to meet the intentions of the contracting party at the time of the execution of the contract.”

The power of eminent domain is an exercise of sovereignty; the Legislature can exercise such power only to the extent that it is delegated by the sovereign power; and this power is exercised by the Legislature by delegating authority to pay for and take property. The board of trustees, therefore, probably could only take and pay for property to the extent that authority was given to take and pay for and no further. *Giesy v. C., W. & Z. R. Co.*, 4 O. S., 308; *Foote v. Cincinnati*, 11 Ohio, 408, 410. Furthermore, as stated in *Currier v. Marietta & Cincinnati Ry.*, 11 O. S., 228:

“There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the power of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously and often vexatiously, with the ordinary rights of property.”

2. It is a well-settled principle that contracts made in pursuance of statutes or resolutions must be construed as though

such statutes or resolution had been embodied and incorporated into the contract; that the law of the land where the contract is made enters into the contract and forms a part of the same, and the scope and effect of the contract is determined by the law; and the parties to a contract are governed in their rights, duties and liabilities under the same by that law.

In *Banks v. Dewitt*, 42 O. S., 263, it was held, syllabus:

"A contract made in pursuance of a statute or resolution must be construed as though such statute or resolution had been incorporated into such contract."

In the opinion, p. 274, the court said:

"The contract which provided not only for the publication of Volume 38, Ohio State Reports, but 'any other subsequent volumes of the Ohio Reports that may be ready for publication within two years from the 23d day of June, 1882,' must be construed in view of the statutes and resolutions relating to the matter."

In *Weil v. State*, 46 O. S., p. 450, at p. 452, the court said:

"The obligation of a contract is the duty which the law at the time of making it imposes upon the parties. As was said by Mr. Justice Washington in *Ogden v. Sanders*, 12 Wheaton, 213, 'The law of the contract forms its obligation.' Judge Cooley, in his work on Constitutional Limitations, p. 346, says: 'The obligation of a contract depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as the measure of the obligation to perform them by one party and the right acquired by the other.'"

On p. 453, the court, in its opinion, says:

"Contracts must be expounded according to the law in force at the time they were made, and the parties are as much bound by a provision contained in a law as if that provision had been inserted in and formed a part of the contract."

In *Gimbert v. Heinsath*, 11 C. C. Rep., 339, syl. 1, the court held that:

"The law of the land where a contract is made enters into the contract and forms a part of the same; and the effect of the

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contract is determined by the law, and the parties to a contract are governed in their rights, duties and liabilities under the same by the law, and by their contracts they make the provisions of the law that then enter into their contract obligatory upon themselves."

See also *State v. Netter*, 3 C. C., 369.

We are not unmindful of the forceful points presented in the very able brief submitted by counsel for plaintiffs on these issues.

The legislation relating to the appropriation of property by the board of trustees seems to leave little doubt that the board was ever granted the general power of appropriation; but was only granted such power so far as necessary in the expenditure of the money raised by the different bond issues; as only \$1,984.12 remained unexpended when the resolution of 1894 was passed, can it fairly be said that it was within the contemplation of the board or the defendant that he was to render services four years afterwards, under a law not then in existence, in appropriation proceedings involving \$1,500,000, which amount, including the costs and expenses, were to be paid by the lessee railroad company; and that for these services the board, which was not liable for them, was to pay him \$50 a month, and no more unless they saw fit?

It is hardly probable that the defendant would have contracted to carry on appropriation proceedings involving a million and a half dollars for \$50 per month, with the uncertainty of any additional compensation for service of such magnitude. To us it seems apparent that the action of the trustees in making payments in excess of \$50 per month indicated their judgment and admission that the reasonable value of the services rendered by this defendant was what they were undertaking to pay him. The auditing committee said, in its report after defendant was appointed trustee, on the suggestion of settlement of defendant's claim:

"Mr. Porter's compensation had the earnest attention of individual members of this board at various times, previous to the admission of either of the members of your committee to the board, by trustees then living under which Mr. Porter ren-

dered the services. These were unable to come to any agreement with Mr. Porter as to his compensation. However, the minutes of this board show that the board did fix an amount as its idea of the value of Mr. Porter's services. * * *

"Your committee can not, under the circumstances, know as much about the value of Mr. Porter's services as members of the board under whom his work was done. In view of these facts, your committee hesitates about reviewing the decisions of the board."

And the committee recommended that it be *left to the court to decide*.

We are of the opinion from the conduct and action of the plaintiff board of trustees and the defendant, and from all the evidence adduced in this case, after careful and serious consideration, that the board of trustees had no power under the resolution of 1894 *after* the services had been rendered to pay the defendant more than \$50 per month. We find that said resolution of 1894 is not susceptible of such construction, and that if it was, it would be void against public policy, and illegal. The exact language of the resolution is:

"Ordered that W. T. Porter be and he is hereby appointed attorney for the board at a compensation of \$50 per month, subject to the will and pleasure of the board, both as to term of service and rate of compensation."

We believe that the legal effect and purpose of this resolution of 1894 was to give the board the power to discharge the defendant as attorney whenever it saw fit, or while retaining him in its service, to reduce or increase his compensation. But such action of reduction or increase, we believe, *must be made before the services are rendered*, otherwise the only amount which the board could pay for such services would be \$50 per month.

The contention that the true construction of the resolution of 1894 is that the board may increase the compensation after the service has been rendered above \$50 a month, but can not at any time after the service has been rendered reduce the amount below \$50 a month, is clearly contrary to the express language of the resolution. The language of the resolution which is cited to sustain this construction is, "subject to the will and pleasure of the board both as to term of service and

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rate of compensation." If it be conceded that under this language the board may increase the compensation after the services were rendered, it necessarily follows that they may also *decrease* the amount of compensation *after* the services are rendered. And yet counsel for the trustees deny that the board had the power to reduce the compensation. The construction contended for seems untenable.

The proper construction of the resolution being as indicated, it necessarily follows that if the services were rendered under this resolution, \$50 was the maximum amount which was to be paid to the defendant. Any other amount paid to him would be paid illegally, and the trustees would be liable on their bonds for such payment. They can make no gift of public money.

The resolution of February 6, 1904, indicates that if it had been the intention of the board to reserve to itself the right to fix the compensation of the defendant in 1894, it would have used apt language to do so.

The resolution of February 6, 1904, reads as follows:

"*Resolved*, That from and after January 1, 1904, W. T. Porter be employed as attorney for the board, to be compensated for such legal services as he may render in matters referred to him by resolution of the board at a compensation to be fixed by the board."

The contention that after services rendered under the resolution the board of trustees had the right to pay such an amount in addition to \$50 a month as in its discretion it might think proper, would make the resolution illegal as against public policy; and the court will not assume a construction of the resolution which makes it illegal, unless compelled to do so.

Unless there are statutory provisions prohibiting it, public officials may make contracts, when such contracts are within their contractual powers, and be liable on the same on a *quantum meruit*. No authority can be found which sustains the right of public officials to make a contract, reserving to themselves the right to fix arbitrarily the amount to be paid under the contract or which is still more iniquitous, to make a contract to pay a certain amount for services, and then arbitrarily

to increase that amount after the work has been performed or the service rendered.

The power to make such a contract would be fraught with the greatest evils.

If a person rendering services or doing work for public officials did not know what he was to receive for his work, depending solely upon the arbitrary whim of the officials with whom he contracted, the tendency on his part inevitably would be to protect himself by doing the work with as little labor as possible, and therefore in a degree, inefficiently; a result greatly against the public interest and welfare.

On the other hand, if public officials could arbitrarily fix the amount to be paid, or arbitrarily add to what had been fixed when the contract was made, the door would be open to all manner of favoritism and fraud. Dishonest officials and contractors would crowd honest contractors out of the field.

No case has been cited in which a contract which left to public officials the arbitrary power to determine what should be paid, has been upheld. The reason undoubtedly is that no public officials have ever before claimed to have such authority.

The test by which to determine whether a given contract is against public policy is stated in the *Cyclopædia of Law and Procedure* (9 Cyc., 481) as follows:

"The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance."

The full citation is as follows:

"It is perhaps not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated as it sometimes has been, the policy of the law or public policy in relation to the administration of the law.

"In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interest of the public, it will be invalid, even though the intention of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance."

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Measured by this very reasonable test, can there be any doubt that a construction of the resolution of 1894, which the board puts upon it in order to justify its action, makes the resolution void as against public policy and makes the payments to the defendant over \$50 per month illegal payments in the nature of gratuities given to him by the board?

The presumption always prevails that parties intend to act legally and not illegally, unless it appears clearly to the contrary. The presumption, therefore, is that the payments made to the defendant were not made under the resolution of 1894, but were payments made to reasonably compensate him out of the terminal fund.

To the contention just stated, the plaintiffs make the following answer:

“If the board had no authority to pay Mr. Porter more than fifty (\$50) dollars a month, he is in no position to complain, as he has been benefited by the action of the board; the only result is that he has been overpaid.”

This answer in effect is that as the defendant has already accepted in part payment more than \$50 a month for his services, he is estopped to deny the right of the board to make such overpayment.

It assumes that the defendant dealt with the board on the assumption that the resolution of 1894 defined his right to compensation, and that both he and the board, knowing that under the resolution of 1894 the board could not pay him more than \$50 a month, nevertheless did illegally make such extra payment to him, and that he with knowledge of this illegality accepted the same.

Both of these assumptions seem without any foundation. There is not a scintilla of evidence in this case that the defendant ever admitted that his rights were defined by the resolution of 1894. On the contrary, he claims that the resolution of 1894 had no reference to the services rendered by him and did not define his right to compensation. He contends that he was entitled to be paid what his services were reasonably worth, and the acceptance of any payment by him was always made and

conceded by the board to be without prejudice to his right to claim a greater amount.

The law is well settled that in order to furnish an occasion for the application of the principle of equitable estoppel, the person claiming estoppel must have been in some way deceived and in reliance thereon have changed his position to his detriment. Both of these elements are lacking here. Bigelow on Estoppel, pp. 604-681; Ewart on Estoppel, p. 10; *Steel v. Smelting Co.*, 106 U. S., 447, syl. 5, pp. 455-6; *American Tube Works v. Boston Co.*, 139 Mass., 5, 11.

The rule forbidding public officials to increase arbitrarily the compensation of a contractor or employee is different with respect to contracts between individuals. The courts uphold contracts between individuals in which it is expressly provided that nothing shall be paid for the thing or the work unless it is satisfactory to the purchaser. In those cases in which the object of the contract is to gratify taste, serve personal convenience or satisfy individual preference the courts have not had great difficulty in upholding the contract; but in all other classes of contracts, even between individuals, the courts will, if possible, construe the contract to mean that the purchaser only intends by the contract that he must be reasonably satisfied, and therefore the court holds that the test is—ought a reasonable man be satisfied? If, however, the contract declares otherwise, the court will enforce the contract, but every presumption is against such intention.

The work to be done by the defendant was not to gratify taste, serve personal convenience or satisfy individual preference, and even if the contract were between him and private individuals instead of public trustees, the presumption would be strongly against the construction contended for by the trustees, and a court will not give it such construction unless it clearly appeared that such a construction expressed the intention of both parties.

From the evidence we find that the *conduct of the parties* to this action in putting a practical construction on the contract of employment of the defendant, indicates the intention of both plaintiffs and defendant that the defendant should be paid what his services were reasonably worth.

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If we examine the conduct of the parties subsequent to the resolutions of January, 1903, designating the defendant as the attorney to conduct the necessary proceedings to acquire property for terminals; and also the subsequent action of the parties with respect to this compensation, as throwing light upon the question as to whether either the board or the defendant supposed they were acting under the \$50 a month resolution of 1894, we find that the subject of compensation to the defendant was not referred to until February 6, 1904, more than a year after the resolutions of January, 1903, employing him to act in the terminal matter.

The resolution of February 6, 1904, reads as follows:

“Resolved: That from and after January 1, 1904, W. T. Porter be employed as attorney for the board, to be compensated for such legal services as he may render in matters referred to him by resolution of the board at a compensation to be fixed by the board.

“Resolved further: That for legal services rendered by said W. T. Porter in the proceedings condemning property for terminals under resolution of January 24, 1903, the sum of fifty (\$50) dollars a month be paid to him on account from and after January 1, 1904, out of the terminal fund, all subject to the right of the board to rescind these resolutions.

“Ordered: That the secretary transmit a copy of the foregoing resolutions to Mr. W. T. Porter.”

A copy of these resolutions was transmitted to the defendant.

It may be observed in passing that if the resolution of 1894 gave the power to the board to fix the compensation as it saw fit, why pass the first of the resolutions of February 6, 1904? The board already had such power. Evidently the board was aware of the fact that the resolution of 1894 gave it no such power and was never intended to do so.

It will also be observed that the board asserts the right in the future to fix the compensation in matters to be referred to him; but it asserts no such right as to his compensation for services under the resolution of January 24, 1903.

It seems that these resolutions clearly make the distinction that the defendant acted in two capacities under instructions from the trustees. *First.* As attorney for the trustees to be

compensated by them out of the \$12,000 paid to them by the lessee railroad company "in conducting their trust;" *Second*. As attorney in acquiring terminal facilities to be paid for out of the terminal fund, which was provided by the lessee railroad company.

For services rendered under the first of these resolutions he was to be paid out of the \$12,000 fund; but for services under the second of these resolutions which related as it says to "proceedings condemning property for terminals under the resolution of January, 1903," he was to be paid out of the "Terminal Fund" and was to be paid fifty dollars a month from and after January 1, 1904, "on account."

It would seem that if the board had claimed the right to arbitrarily fix the compensation of the defendant, which was to be paid out of the terminal fund, it would have asserted that claim in the second resolution when the matter of his compensation first arose, as it asserted it in the first resolution with respect to his employment after January 1, 1904, for the board to be paid out of the \$12,000 fund. Furthermore, the statement in the resolution that the payment therein provided for out of the terminal fund is to be "on account" is entirely inconsistent with the claim that he was to be paid only such an amount as the board might fix. A person can have no "account" against another who has the right to fix his compensation; but an account implies not only a claim, but an *obligation* to pay.

On or about September 24, 1904, the board again took action with respect to the defendant's compensation by adopting the following resolution:

"*Ordered*: That there be paid to W. T. Porter, attorney for the board under the resolution of the board passed February 6, 1904, the sum of one thousand (\$1,000) dollars on account for legal services rendered in the condemnation proceedings in case No. 125,432 Common Pleas Court, *Trustees v. Hooker et al.*"

Here again the board seems to be recognizing not only a claim by the defendant, but an obligation on its part to pay by stating that the \$1,000 is to be a payment "on account."

On November 7, 1904, the board seems to give further evi-

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dence of its recognition of its obligation to pay what was reasonably due, by adopting the following resolution:

“That the President be requested to obtain the bill from W. T. Porter, attorney, for his services in the condemnation proceeding case No. 528, *Trustees v. Hickenlooper et al*, Insolvency Court, Hamilton County, Ohio, and case No. 125,431, *Trustees v. Hooker et al*, Hamilton Common Pleas Court.”

In obedience to this resolution the defendant presented his “bill” with explanatory letter.

If the board had the right to arbitrarily fix the compensation of a person, it is entirely inconsistent to find it calling upon such person to present his “bill.” His “bill” would be what he claimed they owed him. If they had the right to fix his compensation, the board might consistently ask for his “opinion” or “suggestion” as to what they ought in justice to pay him, but not for his bill.

The two following resolutions were subsequently passed January 30, 1905:

“The board of trustees having considered what additional allowance should be made to W. T. Porter for services rendered under the resolutions of January 24, 1903, and January 31, 1903, providing for the appropriation of property for terminals, on motion it was

“*Resolved*, That there be allowed and paid under proper voucher to said W. T. Porter the sum of \$6,050 in addition to the sum heretofore allowed and paid to him on account of services; said sum of \$6,050 to be paid out of the new terminal facilities fund and to be in full of all services rendered under said resolutions.”

The defendant did not accept this allowance and this action resulted.

May 7, 1908:

“*Resolved*, That the sum of \$5,000 be paid to said W. T. Porter, on account of additional allowance made to him January 30, 1905, for services rendered under the resolutions of January 24, 1903, and January 31, 1903, providing for the appropriation of property for terminals; such payment to be made by the trustees and to be accepted by W. T. Porter without prejudice to the rights of either party in the case of the *Trustees of the Cincinnati Southern Railway v. W. T. Porter*, No. 53054, Superior

Court of Cincinnati; further than that the said amount so paid shall be a credit on any amount adjudged to W. T. Porter by the court in said case."

It has been urged against the defendant that in presenting his bill for \$25,000 dated December 1, 1904, he gave credit for \$1,100 paid him at the rate of \$50 a month for the months subsequent to the resolution passed the latter part of January, 1903, employing him in the appropriation proceedings, and that by giving such credit he admitted he was working under the resolution of 1894.

The resolution of February, 1904, recited that he was to be paid "on account" for services in the appropriation matter \$50 a month out of the terminal fund, beginning January 1, 1904. As his bill was presented December 1, 1904, he credited \$50 a month paid during the year 1904 for the eleven months up to December 1, 1904. It is admitted that this credit amounting to \$550 was proper.

It is contended, however, that in giving credit for \$50 a month for eleven months from February to December, inclusive, in 1903—the resolution to appropriate having been passed in the latter part of January—he admitted that he was working in the appropriation matter under the resolution of 1894, which provided for compensation at \$50 a month.

The bill presented by the defendant was for \$25,000. If he had admitted he was working under the resolution of 1894, he could have presented no "bill" except for \$50 a month, and this amount had already been paid him.

The entire time of the defendant was occupied in 1903 in working on the appropriation matter, and he gave the board practically no service except in this matter. He therefore doubtless thought it the fair thing to do to give credit on his "bill" for all the money he received on the order of the board during that period; although had he insisted strictly on his rights, he would not have been obliged to give credit for services in the appropriation matter of the \$50 a month paid him during the year 1903 by the board out of its \$12,000 fund.

We have given careful consideration to the several logical and strong points presented by the helpful and comprehensive brief

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of counsel for plaintiffs, but we are of the opinion from the evidence in this case that the labors of the defendant were so onerous and exacting, and the responsibility in connection therewith so great and important as to indicate conclusively that the services were not rendered pursuant to the resolution of 1894, which provided for payment at \$50 a month, and that the trustees and defendant themselves thus treated the entire subject by their conduct.

It follows, therefore, and we find from the evidence in this case, that the resolution of 1894 did not fix the value of the services for which defendant makes claim and that he is legally entitled to moderate and reasonable compensation. We believe, and so find, that the evidence in this case proves that the defendant rendered the services in question not in pursuance of said resolution of 1894.

The next question, therefore, is, "what is a moderate, reasonable amount to be allowed to the defendant as compensation for the legal services rendered herein?" To begin with, we find that the learned former judge of this court on the initial hearing of this cause, said (see *Railway v. Porter*, 12 N.P.[N.S.], p. 631) that, after considering the nature of the work done, the amount of it, the amount of money involved, the time actually consumed, the skill and ability required and displayed and the responsibility, particularly in the matters involving examination and report on the certificates of title and considering also the amounts actually saved by the defendant's negotiations out of court, as well as by actual trial work, even conceding that in many matters he had the assistance and co-operation of others, this amount finally awarded by the board, in said court's judgment, *was none too liberal*. It seems evident that said court felt satisfied that the amount allowed by the board of trustees to the defendant of \$8,150 was not a moderate or reasonable sum.

In order for us now to determine what sum shall be regarded as a moderate and reasonable sum we must consider all the evidence tending to prove the onerous and exacting character and nature of these legal services, the amount of money involved in the case, the time actually consumed in the trial, the ability and

skill of the defendant required and manifested; we must consider the responsibility particularly in the matters involving examinations and reports on the certification of titles, also the amounts actually saved by the negotiations of this defendant out of court, as well as by actual trial work; the beneficial results coming to the trust directly due to defendant's efforts, etc. Of course, we must consider that in many of these matters the defendant had co-operation and assistance of others.

In support of the claim for services rendered by the defendant of \$25,000, the defendant maintains his contention as to value by his own testimony and by the testimony of certain prominent, able and leading members of this bar, viz.: Mr. Lawrence Maxwell, Jr., Mr. Wade H. Ellis, Mr. L. C. Black, Mr. Louis Kramer, Mr. John C. Healy, Mr. Jonas B. Frenkel and Mr. Byron M. Clendenning. Only two witnesses testified on behalf of the plaintiffs, Judge John R. Sayler, one of the trustees herein, and Mr. Edward Colston, who was one of counsel for plaintiff and of the C., N. O. & T. P. Railway Co., lessees of the Southern Railway. Four of the attorneys who testified for the defendant represented clients who had owned part of the property which was acquired in this very condemnation suit and were personally familiar, in part at least, with defendant's services, and surely were in a good position to put a value on them.

In round numbers the value of the property involved in this condemnation was one million and a half dollars. Negotiations were carried on in reference to one hundred and thirty-seven pieces of real estate; the defendant adjusted and settled for all of this property out of court except eight or ten pieces—more than one hundred lawyers were dealt with; the negotiations extended over a period of six months; the value of the property acquired by negotiation amounted to \$1,331,000; trial was had as to the remainder, the value of which approximated \$100,000; the trial required about two months; action for a new trial was filed; before the trial came on there were preliminary hearings on motions and demurrers and at the end of two months a verdict was rendered and motion for a new trial followed; some of the parties settled, but trial was then had as to the remain-

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ing two pieces lasting ten days; motion for new trial was filed and argued; a bill of exceptions was prepared in one case, and the verdicts rendered amounted to \$97,000. We find that an abstract company furnished statements as to one hundred and thirty-seven pieces of realty involved; the defendant expressed his opinion in writing on each piece as to the soundness of title; he prepared all the deeds and had them executed. The original verdict was rendered in July and in order to enable the plaintiff to get funds it expected to get, defendant succeeded in having the judgment entered six months later, which gave it an additional six months in which to take the property. Finding that it had not enough money the defendant negotiated leases with the property owners for some \$189,000, the effect of these leases being to relieve the plaintiff for that time in taking over said property. The holders of about \$50,000 of property covered by verdicts wanted their money and the defendant negotiated with a bank for a loan of said amount for the plaintiffs. After the verdict had been rendered and judgment entered, a fire destroyed a number of pieces of property and the defendant secured an abatement of \$28,000.

The four attorneys who were in part familiar with the services of the defendant gave the following opinions as to value: Mr. John C. Healy fixed the amount at \$30,000 to \$40,000; Mr. L. C. Black, \$32,000; Mr. Wade H. Ellis, \$30,000 to \$35,000; Mr. Jonas B. Frenkel, \$27,750. Three other attorneys testified that the reasonable value of defendant's services was as follows: Mr. Lawrence Maxwell, \$25,000; Mr. Byron M. Clen Denning, \$15,000 or \$20,000 and Mr. Louis Kramer, \$36,000.

Mr. John C. Healy says that the defendant was very tenacious in getting the figures down on his clients' property for the benefit of the plaintiff trustees; that he put him to a great deal of trouble and although at first they were very far apart on values, through the efforts of defendant they finally got together and adjusted the matter amicably.

Mr. L. C. Black represented a number of clients in this condemnation suit. As to one piece his client claimed \$50,000, but after negotiations with defendant he took \$32,000. On the other piece defendant finally closed negotiations reducing Mr.

Black's claim from \$20,000 to \$15,000. Mr. Black says that he had a great number of negotiations with defendant about these cases and he testifies that defendant exercised highly skillful methods in his conduct.

Mr. Byron M. Clendenning had had special experience in condemnation proceedings, having acquired the property for the Cincinnati Interterminal in 1903 and 1904, beginning with the C. & O. Bridge along Front or Third streets, taking all the property on Third street back to Webb Alley and crossing Baymiller street, taking the front of the block at the southeast corner of Baymiller and Fifth streets and going over to the C., H. & D. Railway. He was also of counsel in the L. & N. condemnation case in the Public Landing cases. With this actual experience much credit and consideration should be given to Mr. Clendenning's opinion and statements.

Mr. Lawrence Maxwell, Jr., one of the foremost attorneys in the United States, gives, from his experience and knowledge, detailing his reasons and fixing the amounts, his opinion that the amount asked for by defendant is a fair, moderate and reasonable sum. He takes into consideration the fact that these services of the defendant redounded to the benefit of the city and therefore the charge should be moderate.

Mr. Louis Kramer, a member of this bar for more than forty years, after taking into consideration the long experience, reputation and technical schooling of the defendant in this kind of work, the magnitude of the transaction, the results achieved and all the other elements involved, gives his opinion of the value of the services at \$30,000 to \$35,000.

Mr. Wade H. Ellis divided the defendant's work into three parts—the negotiations of the bulk of this property \$1,300,000, examining the abstracts and passing upon the titles to 137 pieces of property, and the court services. He believes all this to be worth from \$25,000 to \$27,000. Mr. Ellis was familiar with the work having represented the Wm. Glenny Glass Company in this condemnation suit in its claim of some \$100,000. He says he thought the defendant exhibited much skill and labored to the advantage of his trust.

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Mr. Jonas B. Frenkel also represented a client involved in this condemnation suit. He had the experience of being counsel for the board of water works trustees of Cincinnati for about ten years, having taken part in various litigation of this nature and was familiar with the difficulties attendant. He testified detailing the various values for the services rendered giving as his opinion the sums of from \$25,000 to \$30,000.

With the evidence before us of the defendant himself and Mr. Lawrence Maxwell, Jr., Mr. Jonas B. Frenkel, Mr. L. C. Black, Mr. Wade H. Ellis, Mr. Byron M. Clendenning, Mr. Louis Kramer, and Mr. John C. Healy, all lawyers of good standing, experience and ability at this bar, together with the evidence submitted as to the nature of this work done, the amount of it, the amount of money involved, the time actually consumed, that these services were onerous and exacting, the skill and ability required and displayed, the great and important responsibility particularly in the matters involving examination and report on the certification of titles and considering also the amounts actually saved by the defendant's negotiations out of court, as well as by actual trial work, even conceding that in many matters he had the assistance and co-operation of others and considering the testimony of the *only witnesses against the defendant's claim*, Mr. Edward Colston, who acted in the capacity both of counsel for plaintiff and counsel for the lessee company, and of Judge John R. Sayler, one of the plaintiff trustees who says that *a lawyer who gets \$5,000 in any case, irrespective of the services, is well paid*, and the basis and reasons for their opinions as to value, we must and do come to the conclusion that the amount \$8,150 allowed to the defendant by the board of trustees is not a fair, moderate or reasonable sum in payment therefor.

However, we do feel that the sum to be allowed to this defendant for his services rendered to this public trust should be a moderate amount, perhaps more moderate than should be allowed if he were representing an individual or private concern; it should be fair but not generous, and we have this phase of the case in mind in arriving at a conclusion as to what is to be allowed.

We have considered this case seriously, carefully and at considerable length, have given attention to the voluminous printed record of nearly 400 pages, the pleadings, and the very helpful and masterful briefs of counsel, and have considered the value of the services in question from various angles. We have finally concluded that out of justice and fairness the defendant is entitled to \$8,850, with interest from December 1st, 1904, in addition to the sum previously allowed by the plaintiff board of trustees.

A decree in accordance with this finding may be taken.

**PROSECUTION FOR ASSISTING IN PLACING WAGERS ON
HORSE RACES.**

Common Pleas Court of Hamilton County.

MORTIMER DUNNING v. THE CITY OF CINCINNATI.

Decided, February 25, 1919.

*Gambling—Legality of Seizure of Race Horse Slips—Where Taken
from the Person of One Having Them in Possession.*

1. A police officer may lawfully arrest, without warrant, a person whom he finds violating an ordinance of a municipal corporation against having in possession writings commonly used as memoranda of wagers on horse races.
2. Where the accused is in his place of business, and has lying before him on his counter such writings, which the officer recognizes and which accused takes up and thrusts into his pocket, upon recognizing the officer, the latter "finds" the accused violating the ordinance, and may arrest him without warrant.
3. The forcible taking by the officer from the accused of such papers so thrust into his pocket is within the authority of the officer, and is not in violation of the constitutional right of the accused against unlawful search and seizure.

Harry Hess, for plaintiff in error.

Chauncey Pichel and E. S. Morrissey, contra.

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Dunning v. Cincinnati.

DARBY, J.

Error to the municipal court of Cincinnati.

The plaintiff in error was prosecuted in the court below upon an affidavit charging that

“On or about the 7th day of September, A. D. 1916, at the city of Cincinnati, county of Hamilton and state of Ohio (he) did unlawfully and knowingly have in his possession a certain writing such as is commonly used as a memorandum of a wager upon the result of a trial of the speed and power of endurance of a beast, to-wit, a race horse,”

in violation of the ordinances of the city of Cincinnati, Section 1019-2, as passed December 10, 1912.

A motion to quash the affidavit and a demurrer to the same were filed and overruled, to which exceptions were taken.

Thereupon the plaintiff in error filed a petition asking that the court order a return to him of certain papers and books, alleged to have been taken from his person at the time of his arrest. This motion was also overruled and exception taken.

It was conceded by counsel for the plaintiff in error that the ordinance was sustained as constitutional and that an affidavit in exactly the form in which the one in this case appears, was sustained by this court in a former prosecution against this same plaintiff in error.

The principal complaint of plaintiff in error is that the court erred in refusing his petition to return the papers referred to and in allowing the said papers to be used in evidence against him.

The evidence shows that on the day of the arrest two detectives of the police department of the city of Cincinnati entered the place of business of the plaintiff in error (which was a barber shop), situated in Cincinnati, and there saw the plaintiff in error with two other men standing at a cigar case at the front of the shop; that as the detectives walked toward the show case, they saw lying upon it a race form sheet and two slips of paper upon which were figures and writing, and which the testimony tends to show were memoranda of wagers upon horse races. As soon as the plaintiff in error saw the officers, he snatched the two slips from where they were lying and thrust them into his

pocket. The officers thereupon forcibly took the papers out of the pocket and from the plaintiff in error and placed him under arrest.

The contention of the plaintiff in error is, that in taking these slips from his person, the officers violated his constitutional rights against unlawful search and seizure, and that he was entitled to have the papers returned to him upon his petition, and that such papers were incompetent as evidence against him.

The defendant in error contends that the petition was not filed within proper time, and that upon that ground the court was justified in refusing the petition.

The view this court takes of the situation makes it unimportant as to whether the petition was filed in time or not.

The court below found that the papers taken from the plaintiff in error were such as, the possession of which, constituted a violation by plaintiff in error of the ordinance referred to. When the slips were first seen by the officers they were lying on full view upon the cigar case referred to, and when the plaintiff in error saw the officers, he immediately, as shown by the evidence, snatched them up and put them in his pocket. He exercised dominion and apparent ownership of the papers by taking them as described and putting them in his pocket; so that there can be no question that he had them in his possession, and he was actually found by the officers with them in his possession even before he so placed them in his pocket. The officers, as claimed by the plaintiff in error, thereupon forcibly took them from his possession, and, in the view this court takes of that act, they then and there placed him under arrest. In the presence of the officers he tried to dispose of the very things which the law forbade him to have in his possession.

The plaintiff in error claimed that there was no right of arrest or search at the store, but that the officers should have procured a search warrant authorizing them to search the plaintiff in error to take these papers from him.

In argument, many cases were referred to, which have no pertinency to the case at bar, as it can be very readily distinguished from the case of the unlawful search of a man's premises and seizure of his papers without a search warrant.

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The leading case on this subject in this country is *Weeks v. United States*, 232 U. S., 383, in which the facts were, that after the arrest of the defendant, officers of the Government, without a search warrant, went to his premises, and in his absence searched the same, and took his private papers, which the court held to be in violation of his constitutional rights. Mr. Justice Day in the opinion very clearly distinguishes that case from the case at bar when he says on page 392:

“What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, Section 211; Wharton Criminal Pleadings and Practice, eighth edition, Section 60; *Dillon v. O'Brien and Davis*, 16 Cox C.C., 245.”

The arrest in this case was legal, as is clearly settled in *Ballard v. State*, 43 Ohio St., 340. The court had under consideration in that case the power of the marshal of a municipality or of a police officer to make arrest without warrant, and in construing General Code, Section 13492 (R. S. Sec. 7129) and General Code, Section 4386 (R. S. Section 1849), held that:

“Under a proper construction of these sections, a marshal of a municipal corporation is authorized, without warrant, to arrest a person found on the public streets of the corporation carrying concealed weapons contrary to law, although he has no previous personal knowledge of the fact, if he acts *bona fide*, and upon such information as induces an honest belief that the person arrested is in the act of violating the law.”

Section 13492, General Code, so far as it applies to this case is as follows:

“A sheriff * * * or police officer, shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village until a legal warrant can be obtained.”

This section made it the imperative duty of the officers to arrest the plaintiff in error when they found him violating the ordinance of the city, and the search of his person then and there was justified.

The case of *Hirsch v. Cincinnati*, 21 O.C.C.(N.S.) 561, sustains the right to offer such evidence as is under consideration against the plaintiff in error.

It was conceded in argument by counsel for plaintiff in error that fruits or evidences of crime, such as a weapon or stolen property, might lawfully be taken from a person placed under arrest, but he claimed that because the articles taken from the plaintiff in error were papers, that some other rule must be applied.

There is no foundation for any such distinction, as is clearly indicated in the *Weeks* case above.

On the trial, the only witnesses who testified were the two police officers, whose testimony was to the effect that these slips consisted of such memoranda as are described in the section. They stated that at the time of the arrest plaintiff in error claimed that the papers were private accounts, but no testimony was offered to prove this latter fact, nor, indeed, was any evidence offered in the case except that of the two police officers.

This court can not say that the finding against the plaintiff in error is not sustained by sufficient evidence.

Other points were raised, and irregularities in the proceedings referred to, but if such existed they were not such as to prejudice plaintiff in error or to deny him any substantial right.

The judgment of the municipal court will therefore be affirmed.

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Hammond v. MacKay.

SITUS OF A DEBT OWING TO A NON-RESIDENT.

Common Pleas Court of Clark County.

HARRIS HAMMOND v. JOHN FREEMAN MACKEY.

Decided, February 17, 1919.

Attachment and Garnishment—Jurisdiction where the Property Sought to be Attached is Owned by a Non-Resident—Conflicting Views as to Whether the Situs of a Debt is the Domicile of the Debtor or of the Creditor.

1. Credits of a non-resident debtor payable generally, may, without personal service upon such debtor, be garnished in this state, by serving process on his debtor residing within the jurisdiction of the court. Statements in *Root & McBride Bros v. Davis*, 51 Ohio St., 29, and in *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St., 543, seeming to deny this, are *obiter dicta*.
2. A non-resident creditor is not excluded from bringing such an action.

Paul C. Martin and George Raup, for plaintiff.

Keifer & Keifer, contra.

GEIGER, J.

The plaintiff, Harris Hammond, is a resident of the state of New York, and claims to be a creditor of the defendant John Freeman MacKay, who is a resident of the state of New Jersey, the claim being based upon an alleged breach of contract.

An affidavit for attachment was filed, and pursuant to the order of attachment, notices were served upon the Springfield National Bank and the Buckeye Incubator Company as garnishees, it being claimed that the Springfield National Bank has money on deposit belonging to the defendant, and that the Buckeye Incubator Company is a debtor of the defendant.

The defendant has filed a motion to set aside the attachment upon several grounds.

First, that the debts sought to be attached are not within the jurisdiction of the court and are not subject to attachment, for

the reason that the creditor as well as the defendants herein are not residents of the state of Ohio;

Second, That the affidavit is insufficient in law;

Third, that no proper service was made upon the garnishees.

A motion is also made to set aside the constructive service, for the reason that the affidavit for attachment is insufficient in law, and that there has been no valid attachment of any property herein.

An interesting question is presented by the motion to dismiss the attachment. Broadly, it is based upon the claim upon the part of the defendant, that the debt being due to a non-resident of the state of Ohio the situs of the debt or property attached is not within the jurisdiction of the court.

It must be conceded that the court acquires no jurisdiction in an attachment case unless the property taken is within its jurisdiction, the court having no extra territorial power.

It is then to be determined, if possible, what is the correct solution of the question as to the location or situs of a debt due from a debtor within the jurisdiction of the court, to a creditor outside the jurisdiction of the court.

One view sustained by decisions, as well as by text-book writers, is that the situs of the debt is the domicile of the creditor. Another view is, that the situs of the debt is the domicile of the debtor. Still another view taken by courts in attachment cases is that the question of the situs of the debt is not material in determining the power of the court in such cases—that the situs of the debt may be either the domicile of the debtor or the creditor.

The Ohio courts have not been in accord in the determination of this matter, and the Supreme Court of Ohio has apparently not decided the question in a case clearly presenting the issue.

In the case of *Owen v. Miller*, 10 O. S. 136, the court, in passing upon a case in which a resident of Ohio, taking promissory notes, removed to New Jersey where under a writ of attachment the notes were seized and sold. *Held*: That the notes were merely evidence of the indebtedness and the seizure of them in New Jer-

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sey gave no power to divest the property in the debt secured by the notes and mortgage, which is to be regarded as existing where the makers of the notes—the debtor resided. The court, on page 144 says:

“We are brought then to the simple question whether the promissory note given for a debt, being in New Jersey and the makers of the notes, the debtors, residing in Ohio, the property was in New Jersey or in Ohio? In substance, there is a sum of money in the hands of one man to which another has title or claim and the evidence of that title or claim is the promise in writing to pay the money. Upon principle, it would seem clear that the subject-matter to which the title or claim relates, is the property and not the evidence showing the title or claim.”

The court in this case reviews a number of cases which support the court's holding.

In the case of *B. & O. Railroad Company v. May*, 25 O. S. 347, it is held:

“In an action to recover money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister state. in an action there prosecuted against the defendant by his creditors, although it appear that the plaintiff and such creditors are all residents of this state.”

The action was brought in a county in this state to recover on an account. The defendant set up that the creditors of the plaintiff had sued the plaintiff before a justice of the peace in West Virginia, and had attached the money due from the defendant to the plaintiff, and that an order had been made that the defendant should pay into that court the amount due plaintiff; that the justice had full jurisdiction, and that the money so attached was the same sought to be recovered by the plaintiff. To this answer the plaintiff demurred. The court says the demurrer to the answer should have been overruled. The facts were a good defense. The justice in West Virginia having jurisdiction of the subject and of the parties, the order in attachment

made upon the garnishee was a valid appropriation of the money in his hands to the payment of the attaching creditor's claims.

This case is cited to sustain the position that a debt due may be garnished where the debtor is served, even though the creditor may be without the jurisdiction of the court issuing the attachment.

The court, in the case of *Root & McBride Brothers v. Davis et al.*, 51 O. S. 29, at page 36 says in part:

"It may be conceded, that the credits of a non-resident debtor, without personal service upon him, can not be attached in this state, by simply serving the process of garnishment upon his debtor residing within the jurisdiction of the court issuing the process. That would be, as claimed, to give to the laws of a state an extra territorial effect. In *Railroad Company v. May*, 25 Ohio St. 347, it was held that the indebtedness of the company to a person residing in this state could be attached in the courts of a sister state, without personal service; but this, in the opinion of the author of a recent work, seems opposed to the decision of the Supreme Court of the United States." Citing *Reno on Non-Residence*.

"But as between citizens of the state subject to its laws, the case is wholly different. While the situs of a credit is generally regarded as that of the creditor, it would be quite as reasonable to treat it as that of the debtor; for the debtor is the person from whom the money is derived that makes the credit available as a thing of value. So that there is nothing in the nature of things forbidding the place of the debtor being regarded as the situs of a credit; and hence it is competent to the Legislature to enact, as has been done in this state, that the property and effects of every kind of a resident of one county may be attached by his creditor in another, on the ground of his non-residence therein, by serving the process of garnishment upon a person having possession of his property, or being indebted to him," etc.

Part of this quotation is clearly *obiter dictum*, and the implied criticism of the holding in *Railroad Company v. May*, seems to be based upon the opinion of a textbook writer, that that case was in conflict with a case decided by the Supreme Court of the United States.

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The case decided by the Supreme Court of the United States, to which the textbook writer referred, is that of *Cole v. Cunningham*, 133 U. S. 107. This case, in the opinion of this court, does not justify the criticism in the case in *Railroad Company v. May*. The Ohio court, however, does seem to criticise the holding in the case of *Railroad Company v. May*.

The next case of interest, in the Supreme Court, is that of the *Buckeye Pipe Line Company v. Fee*, 62 O. S. 543, in which it is held that the attachment statutes do not give to the court issuing process jurisdiction over property of the defendant situate wholly beyond the borders of the state.

The property involved in this case was not a credit, but was certain oil claimed to be owned by the defendant, and while it is not decisive of the right of the creditor to garnishee a debt, there are in the opinion some remarks of the court which would indicate that the same principle which prevents a creditor from attaching tangible property outside the jurisdiction of the court, would prevent the garnishing of a debt due to a creditor domiciled beyond the jurisdiction of the court.

The court, on page 560, quotes 8 Am. & Eng. Ency. Law, 1255 as saying:

“The domicile of the garnishee does not give the courts of the state jurisdiction over the debt he owes to a party in another state, and is not sufficient to sustain an action *in rem*. This is not determined by his domicile, but by the situs of the property which he holds.”

On page 561 the court quotes from certain cases which might indicate that where a state could not reach property for the purpose of taxing it, it could not confer the right of seizure of such property upon her citizens.

It is clear that in the present case the state has no right to tax the debt owing by a local debtor to a foreign creditor, and it may be argued that lacking this power to tax the debt, the state could not give to a creditor the right to seize such property.

The following cases in Ohio sustain the view that a debt due to a creditor residing outside the state can not be garnished.

American Sheet & Tin Plate Company v. Lewis, 20 C. C. (N.S.), 443; *Boyd v. Hewitt*, 5 N. P. (N.S.), 332; *Kelly v. Garvin Machine Company*, 6 N. P., 350.

These cases can possibly be distinguished from the case at bar on account of the different facts involved, but broadly they seem to sustain the position that a debt due to a creditor, non-resident of the state, can not be reached by garnishee process, for the reason that the court does not obtain jurisdiction of the property.

An opposite view is expressed in the following cases, in courts of inferior jurisdiction in Ohio: *Gobie v. Bank*, 3 N. P., 109, a well-considered case, in which the opinions in *Root v. Davis*, and *Railroad Company v. May*, are commented upon, and *Olcott v. Guerinck*, 19 C. C., 32; *Barbour v. Boyce*, 7 N. P., 504.

The holdings in the above cited cases in the inferior courts of Ohio, indicate to what extent this question is unsettled.

The court has been cited to and has read many cases of other states than Ohio, but owing to their conflict feels it would be of no value to specially comment upon them.

The question has been considered in a number of Federal cases. The case of *Reamers v. Seatco Manufacturing Company*, 70 Fed., 573, opinion by Judge Taft, has been cited by counsel for defendant, but in this case a debt due to one resident of one state is sought to be attached in Michigan, where neither the debtor nor creditor reside, and the court held that though under the statutes of Michigan, a foreign corporation doing business in that state subjected itself to service of process in Michigan, the court could not acquire jurisdiction *in rem* to pronounce judgment in favor of the non-resident against a foreign corporation by the garnishment of a debt due to the defendant from another foreign corporation, and not payable within the state. The court on page 574 says:

"We conceive it to be well settled by authority that while, generally speaking, the situs of the debt is constructively with the creditor to whom it belonged, it is within the competence of the sovereign of the residence of the debtor, by reason of its control over its own residents, to pass laws subjecting the debt to seizure within its territorial sovereignty."

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In the case of *Railroad Co. v. Strum*, 174 U. S. 710, it is held that:

“Jurisdiction in garnishment of a debt, due to a non-resident creditor, may be acquired without service on him except by publication so as to make a judgment against him valid and to entitle it to full faith and credit in other states.”

The court says:

“The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it you must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding in *rem*.”

In the case of *Harris v. Balk*, 198 U. S. 215, it is held that the temporary presence of the garnishee within the state gives to the court in that state jurisdiction to render judgment against him in garnishment proceeding upon personal service within the state, if during such temporary presence in the state the principal debtor could have sued there to recover the debt, and the laws of the state permit the garnishment of the debtor of the principal debtor.

The court says:

“If there be a law of the state providing for the attachment of the debt, then if the garnishee be found in that state and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him and can garnishee the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt.”

While the courts of this state may not be bound by decisions in the Federal court, yet the principles enunciated in these various federal decisions must have great weight in considering this matter which is in so much doubt in Ohio.

It would seem to this court that as a debt due from a debtor in this state to a creditor in a foreign state, which is payable generally and not at a particular place, may be collected by the creditor in any jurisdiction in which he can obtain service upon his debtor, that such debt may be garnished in any jurisdiction where service can be obtained on the debtor.

Garnishee process places a garnishee creditor in the position of a general creditor, and he has a right to such proceedings as the creditor himself would be entitled to if he brought suit against his debtor.

It is the right of action that is seized in a garnishee proceeding, and that right of action exists in any jurisdiction which may obtain service upon the person owing the debt.

The court, in the case of *Root v. Davis, supra*, says.

“There is nothing in the nature of things forbidding the place of the debtor being regarded as the *situs* of the credit; and hence it is competent to the Legislature to enact, as has been done in this state, that the property and effects of every kind of a resident of one county may be attached by his creditor in another, on the ground of his non-residence therein, by serving the process of garnishment upon a person * * * being indebted to him in the county.”

If this is true, why is it not equally true that the property and credits of the resident of another state may be attached by his creditor, by serving the process of garnishment upon the person having possession of his property or being indebted to him?

Of course the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to the court. *Railroad Company v. Strum, supra*.

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Credits of this nature are valuable, and the attachment statutes were enacted to enable a creditor to seize valuable property belonging to his non-resident debtor. If he can not seize it because his debtor, the creditor of the garnishee, lives out of the state, neither could he seize it in the state where his debtor resides, because there it would be clearly beyond the jurisdiction of the court. Thus valuable property, consisting of credits belonging to the non-resident debtor would be entirely removed from the danger of attachment.

It is clear that our statutes provide for a seizing by garnishee of debts due to non-residents.

Section 11276 provides that such an action against a non-resident of this state may be brought in any county in which there is property of, or debts owing to the defendant.

Section 11819 provides that in an action for the recovery of money an attachment against property of the defendant may be had on the grounds set out in said section, one of which is that the defendant is not a resident of the state.

Section 11837 provides that an order of attachment shall bind the property attached from the time of service, and that the garnishee shall be liable to the plaintiff for all property of the defendant in his hands and money and credits due from him to the defendant from the time of service.

Section 11847 provides that after written notice is issued the garnishee shall answer, under oath, all questions put to him touching property of every description and credits, and disclose the amount owing by him to the defendant.

Section 11848 provides that a garnishee may pay the money owing by him to the defendant to the officer holding the attachment and that if he disclose the property in his hands, or the amount owing by him, and delivers or pays it according to the order, he shall be allowed his costs.

Section 11855 provides if a judgment be rendered for the plaintiff, it shall be satisfied as follows:—The money arising from the sale of the property with the amount which may be recovered from the garnishee shall be applied to satisfying the judgment.

The statutes provide that a creditor may have an attachment on the ground of the non-residence of his debtor, and may seize through such an attachment, not only the property of the debtor, but any money that may be due from the garnishee to the debtor.

There is no distinction in the statute which omits from such seizure money that is due to the non-resident, but the statute distinctly says that any money that is due to a non-resident may be seized.

The Legislature of Ohio certainly has the power to provide that a creditor in Ohio has the right to seize money that may be due to his non-resident debtor, and there is nothing in the statutes which excludes from this right a non-resident creditor.

The fact that the plaintiff in this case is not a resident of Ohio does not deprive him of any right that a resident of Ohio has to seize upon the money due to his non-resident debtor.

The court is of the opinion that the case of *Root v. Davis*, if properly read, sustains this right and that that portion of the case which seems to deny it is *obiter dictum*, and does not control.

The motion to dismiss the attachment on the ground that the debt is due to a non-resident creditor, is overruled.

It is further claimed that the affidavit in this case is defective on the ground that a certain portion of it which should be stated positively, is stated to be upon the belief of the affiant. The court does not so read the affidavit. The affidavit says, "Affiant believes plaintiff ought to recover from the defendant the sum of \$12,500.00. The defendant John Freeman MacKay is a non-resident of the state of Ohio." This is a positive statement that the defendant is a non-resident, and is not a statement that the affiant believes he is a non-resident.

Motion to dismiss the attachment overruled.

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Lowden v. Pine Club et al.

**NO CURE BY AMENDMENT OF A FATALLY DEFECTIVE
ORIGINAL PETITION.**

Common Pleas Court of Franklin County.

FLORA LOWDEN V. THE PINE CLUB ET AL.*

Decided, December 16, 1918.

Gambling—Penalty Not Recoverable for Separate Losses—Premature Suit by Wife for Recovery of Money Lost by Her Husband—Nature of Her Action Not Changed by Filing an Amended Petition—Amendment to a Petition Distinguished from an Amended Petition—Property Owners Brought in After the Statute Had Run as to Them.

1. The nature of an action, prematurely brought by a wife for recovery of money lost by her husband in gambling, can not be changed and the proceeding given validity by the filing of an amended petition making the owners and occupants of the premises parties to the action. The only course open in such a case is the dismissal of the action and the filing of a new one.
2. Moreover, were it possible to give validity to the original action by the filing of an amended petition, a delay of more than eighteen months in bringing in the owners and occupants of the premises, when the statute of limitations had run as to them, would be fatal, inasmuch as a claim set up for the first time in an amended petition does not relate back to the date of the filing of the original petition, but is rendered nugatory by the fact that the rights of the new parties have become determined.

F. S. Monnett, for plaintiff.*Franklin Rubrecht*, contra.

KINKEAD, J.

This action was commenced January 9, 1917. The cause of action was one by plaintiff as wife of Albert Lowden dependent for support upon him and entitled to his earnings. Recovery

*Affirmed by the court of appeals.

was sought only from the Pine Club, a corporation, and defendants Walter Hicks and D. C. Henderson, with whom Albert Lowden, plaintiff's husband, played games of chance, losing the total sum of \$945.50.

The first amount of money plaintiff's husband was alleged to have lost at gambling with defendants was on the 14th of September, 1916. Other loosings occurred September 15 to 30, inclusive, October 1 to 31, inclusive, and November 1 to 16, inclusive, 1916. This husband's daily occupation seems to have been that of gambling for nearly three months. He must have had sufficient resources to have so persistently followed that occupation, or to have scored sufficient winnings to have kept him in that daily occupation such length of time.

In the original petition plaintiff set up each alleged loss as a separate cause of action, and sought to recover a penalty upon each one. This was held improper.

A demurrer was filed to the petition. Plaintiff brought her action within the six months from the losses and hence before she had any right to maintain an action under the statute. She had not made the occupants or owners of the building parties defendant by her original petition. On demurrer Judge Evans held the wife had no right to maintain her action, because up to that period the husband had the exclusive right to institute an action in his own right. Section 5966. *Hoos v. Layton*, 3 O. S., 352.

No action had accrued in plaintiff's favor when she brought her action, hence the only order that could properly have been made when the demurrer was sustained was a dismissal of the action. It was error to grant leave to file an amended petition for the reason that it was perfectly plain that under the rules of pleading plaintiff could not change the nature of her action by an amendment.

The original petition was filed January 9, 1917; the amended petition was filed July 23, 1918, eighteen months after commencement of her action, which it was decided she had no right under the law to bring. The action should have been dismissed, and a new one commenced.

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At the time of bringing in of the parties defendant who occupied or owned the property, plaintiff's claim against them had become barred by the statute, the limitation of one year being a statutory penalty. *Cooper v. Rowley*, 29 O. S., 547; *Harrington v. Halliday*, 4 N.P.(N.S.), 281.

It is also well settled that an amendment or amended pleading not only can not bring in a claim barred since commencement of the action (Kinkead Pleading, Section 131; *Hills v. Ludwig*, 46 O. S., 373; *Commissioners v. Andrews*, 18 O. S., 69); *Marrriott v. Railway Co.*, 2 N.P.(N.S.), 231, but a plaintiff can not add new parties by an amended petition as to whom the statute of limitations has run since the original petition was filed and action commenced. Kinkead Pleading, Section 131, note 6 and authorities cited.

Furthermore, it is a settled rule of practice that an amended petition can not change the cause of action or bring in a new cause of action. An amendment can not change the nature or scope of the cause of action set forth in the original petition. Phillips Pleading, Section 313; *Hawkins v. Furnace Co.*, 40 O. S., 507.

The fundamental conception is that an amended pleading relates back, is substituted and takes the place of the original, and has exclusive relation to the time of commencing the action, the rights of the parties being determined as of that time; the statute of limitations ceases to run when the original petition is filed. But a party can not by amendment bring in a claim omitted in the petition which has become barred since the filing of the original petition and have it relate back to the filing of the original petition so as to defeat the statute. Kinkead Code Pldg., Section 111 and cases cited.

We have never known any better authority on the subject than the learned judge who analyzed the gambling statutes in *Vincent v. Taylor*, 60 O. S., 309. He pointed out the difference in character between the cause of action inuring to the player and to the wife. That of the player is lost unless he institutes his action in six months. And the right of the wife does not accrue until that of the player is lost.

This court found on demurrer that plaintiff had no right of action at the time when her suit was brought. And under the well settled rules of procedure plaintiff can not sleep on her rights by prolonging this action by the unwarranted mode of procedure pursued by her, until she has not only lost her rights against the participating defendants, but especially as against the additional parties sought to be brought in by the amended petition.

The demurrers to the amended petition are sustained and the action is ordered dismissed at plaintiff's costs.

ON MOTION FOR REHEARING.

This case comes up on application for rehearing on the demurrer to the petition. Reconsideration was asked by plaintiff for the reason that the former opinion did not take into consideration the fact that plaintiff had on September 6, 1917, filed an amendment to the petition, making defendants the several occupants and owners of the property in which the gaming took place. Summons was served on the defendants named.

It is now claimed that the former decision of this branch of the court conflicts with that of another branch which overruled a motion to strike the amendment to the petition from the files. The claim was that the amendment to the petition substituted a new cause of action. One branch of the court thought not and overruled the motion to strike the amendment from the files.

But the consideration of such motion necessarily could not involve the questions presented upon a demurrer to the amended petition which this branch of the court sustained. We were not then aware of the fact that an amendment to the petition had been filed as above stated.

Counsel for plaintiff suggests that there is a conflict of ruling between different branches of the court. Rathmell, J., ordered that the occupants and owners of property should be made parties by granting leave to file an amendment to the petition; he also

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overruled a motion by those defendants to strike the amendment from the files (October 10, 1917). The appearance docket shows that one of the property owners filed a demurrer. An entry was made November 9, 1917, reciting that the demurrers of the defendants are each severally overruled.

Long thereafter, however, July 27, 1918, Judge Evans sustained a demurrer to plaintiff's petition, the entry ordering that "The petition of plaintiff be dismissed at her costs." But to this entry is improperly "tacked" on in writing the following: "Leave is granted plaintiff to amend in rule."

The order of the court was intended to dismiss the action; an amended petition could in no wise cure a fatally defective original petition. This branch of the court followed Judge Evans' conclusion which is deemed to be right.

There can be no denial that plaintiff had no right of action when she instituted her suit, and she could make no amendment by any process whatsoever that could save her case.

The amendment filed making occupants and owners parties defendant had no peg to stand on; it amounted to nothing and can have no possible legal efficacy now since Judge Evans sustained the demurrer.

This branch of the court sustained the demurrer to the amended petition. There is a vast difference between an amendment to the petition and amended petition. The amended petition supersedes and takes the place of all other petitions or pretended amendments thereto.

It is settled practice that an amended petition or an amendment to a petition relates back to and takes the place of the original petition. An original petition such as the one by the wife in this case filed before she had any right of action in herself, can not be amended by such form of amendment as was attempted in this case by adding the parties who own the property.

When the foundation falls the whole house falls. Plaintiff not having a right of action in her own right when she filed this action—having slept on her rights by prolonging this action until her individual claim under another statute has become barred—

she certainly has no standing on an amended pleading that takes the place of all others and relates back and undertakes to state her rights as of the date of January 9, 1917, when she commenced this action.

Counsel for plaintiff still contends that *Vincent v. Taylor*, 60 O. S., 309, does not support the court in the action taken by Judge Evans. We think it does. Judge Bradbury plainly stated (p. 313), that old Section 4270, now Section 5966, does not by its terms give the wife a right of action at all. He states:

“Her right to maintain an action * * * depends upon the provisions of a succeeding Section 4273 (now Section 5969) and did not accrue to her until the conditions prescribed by the latter section had happened. The plaintiff below did not attempt in her petition to show that such conditions had occurred. It seems to us, therefore, that the petition did not state a cause of action that fell within the provisions of Section 4270 R. S.”

That is exactly this case. Plaintiff must fail.

The former decision is adhered to. The action is ordered dismissed at plaintiff's costs.

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WOMAN THROWN UPON PAVEMENT BY LURCH OF CAR.

Common Pleas Court of Hamilton County.

MAUDE MCKIM v. THE CINCINNATI TRACTION COMPANY.

Decided, April, 1919.

Negligence—Alighting Street Car Passenger is Thrown and Injured—Complaint of Improper Argument to Jury—Exceptions and Objections Distinguished—Alleged Excessive Verdict—Competency of Evidence.

1. Where counsel "excepts" to the course of argument to the jury pursued by his opponent, but does not in terms "object" thereto, and upon being questioned by the court stated that he did not desire a ruling on his exception, the error to which the exception was directed if any there be, is not saved, and it is too late after an adverse verdict to ask, on motion for a new trial, for a ruling on the exception.
2. An incompetent and immaterial answer, which has been ruled out, is not rendered competent by making it a part of the answer to a subsequent question to which a proper answer was possible, where there was notice of the objection and the feature of the answer to which the objection was directed has not been eliminated but the substantial portion is found in answers to other questions.
3. A verdict of \$7,583 in favor of a student nurse, twenty-five years of age and in perfect health, who was a hospital inmate for three months in consequence of injuries to her head and spine, and who continued thereafter to suffer greatly and was compelled to undergo an operation which rendered her incapable of bearing children and whose impaired health is likely to be permanent, will not be set aside as excessive or as indicating passion and prejudice on the part of the jury due to the use by her attorney, in argument, of the expression "poor girl" and the placing of his hand in a familiar way on the knee of one of the jurors as he was seeking to impress them with the seriousness of the injuries suffered.

S. A. Anderson and Thos. L. Michie, for plaintiff.

Sherman T. McPherson, for defendant.

MATTHEWS, J.

The jury in this case returned a verdict in favor of the plaintiff, and the cause now comes before the court upon a motion of the defendant for a new trial. Various grounds for a new trial are set forth in the motion, but the only ones urged upon the court in oral argument or by brief, are:

1. Misconduct of plaintiff's counsel, Anderson, in his argument to the jury.
2. That the court erred in refusing to permit certain questions and answers in the deposition of Dr. Gillespie to be read to the jury.
3. That the verdict was excessive, appearing to have been given under the influence of passion and prejudice.

FIRST GROUND.

In considering this ground for a new trial, the court is confronted with the contention by the plaintiff that the record shows the question of misconduct in argument was not properly raised and saved at the trial. During the argument of plaintiff's counsel, Mr. Anderson, counsel for defendant on three occasions interrupted the argument and made this statement the first time: "I want to except to that statement, your Honor, it is not correct," and repeated the substance of this "exception" the other two times. At the close of Mr. Anderson's argument this colloquy took place between counsel for the defendant and the court:

"Mr. McPherson: May I have an exception to that last statement, your Honor, wherein counsel was appealing to the passion and prejudice of the jury, and may it please your Honor, I want to take another exception."

"The Court: I understand you are not asking me to make any ruling?"

"Mr. McPherson: No, I want to take exception to the action of counsel patting a juror on the knees and making that personal appeal to a juror."

The question presented is whether the act of excepting to statements of counsel in argument to the jury, coupled with an ex-

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press disclaimer of any request for a ruling by the trial Judge either in withdrawing a juror and continuing the case or in warning offending counsel and instructing the jury to disregard the improper statement, forms a sufficient basis for a claim of error justifying the setting aside of the verdict thereafter rendered in the case.

In the case of *Hayes v. Smith*, 62 Ohio State, 161, the court held that,

“It is a duty of the trial court which is not merely discretionary, when counsel grossly abuses his privilege to the manifest prejudice of the opposite party, to interpose and admonish the offending counsel and to instruct the jury in regard thereto; and if it fail to do so, it is ground for a new trial.”

And also that,

“The form in which an objection to such an abuse of privilege is brought to the notice of the trial court is not material; and when the record shows that the opposing counsel addressed his objections and exceptions directly to the court, and the full record being before the reviewing court, *it does not appear that the trial court took any notice thereof, nor that it acted thereon, it will be presumed* to have refused to rule out the objectionable matter, and such failure and refusal will be ground for reversal.”

In the case just cited the record shows that during the argument in question opposing counsel addressed the court and made his “objection” and then took his “exception.” The record shows that the trial court took no notice of the objection in any way.

In the case at bar, defendant’s counsel at no point during the argument of Mr. Anderson interposed an “objection” in that term. What he did was to lodge an “exception.” The trial court did not understand that counsel was asking for any ruling of any sort, and when Mr. Anderson closed his argument and defendant’s counsel again lodged an “exception,” the court asked him whether he was asking the court to make any ruling and he responded in the negative.

The distinction between an "objection" and an "exception" is well settled and is stated in the case of *Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St., 77, at page 81, in this language:

"From the record before us it simply appears, that these observations were made by counsel for the plaintiff to the jury, and that counsel for the defendants then and there "objected and excepted." From this we readily infer that counsel "objected" to the remarks of the opposing counsel, as he had an undoubted right to do. But to what did he "except." An exception is not to the act of a party but to that of a court in ruling on an objection. What the court did in this matter is not disclosed by the record."

This state of the record, it seems to the court, entirely distinguishes it from the case of *Hayes v. Smith*. The case at bar differs from that case in that no "objection" was interposed at any time to the argument. An "exception" alone was lodged, and contrary to the inaction of the court in *Hayes v. Smith, supra* the trial court in the case at bar did take notice of the lodging of the exception by asking defendant's counsel whether he was requesting this court to make any ruling. Upon receiving an answer in the negative the court made no ruling at that time, but did cover the subject later in the general charge.

The subject of the manner in which error based upon improper remarks to a jury should be saved has received the attention of the courts in practically all jurisdictions. In the case of *Spahn v. People's Railway Co.*, 92 Atl., 727 (Del.) plaintiff's counsel was guilty of improper statements in argument in referring to an injury to his own knee and to the pain and suffering to him therefrom. No "objection" was made at the time, and the reviewing court held therefore, that it was no ground for reversal.

In the case of *Pascoe v. Nelson et al.*, 158 Pac. 317, (Montana) decided in 1916, it was charged that plaintiff's counsel in explaining his failure to call certain witnesses, said:

"That defendant Nelson had 'seen the doctors first,' and had wrongfully induced them not to testify; that Nelson and Peder-

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son had more money than the plaintiff; that the jurors by their verdict should make the plaintiff a Christmas present; and, finally, that the attorney repeatedly impressed upon the jury the fact that the liability of the defendants, Nelson & Pederson, was insured by an indemnity company, which company was really the party defending and the one ultimately liable for any judgment which plaintiff might recover."

In discussing this argument and the manner of saving the exception thereto the court, at page 318, says:

"The same judge who tried the cause heard the argument, who was appealed to by defendants and who admonished plaintiff's counsel, denied a new trial for the reason that the defendants had not requested the court to instruct the jury to disregard counsel's remarks. To what extent, if at all, the trial court found the charges made against plaintiff's counsel to be true, we are unable to determine. The burden was upon the moving party, the defendants, and we can not say from the printed record that they sustained it. Assuming, however, that counsel made the remarks attributed to him, a proper admonition to the jury to disregard them ought to have been sufficient. So long as the jury system is in vogue courts must assume that jurors possess sufficient intelligence and force of character to discharge their duty when properly directed. Appellants failed to ask the trial court to admonish the jury, and for that reason the order denying their motion for a new trial should be affirmed."

In the case of *Lunsford v. Hatfield Coal Co.*, 178 S. W., 1166 (Kentucky) defendant's counsel made improper remarks in argument to the jury to which no "objection" was made at the time, and discussing this subject at page 1167, the court says:

"Whatever may have been the effect of this occurrence, if any, upon the verdict, it was the duty of the party desiring to get the benefit of it to make the question at the time, and not wait until a verdict was rendered against him and then make it. A party may not take his chances upon the effect of such an occurrence during a trial, and thereafter, when the jury has returned a verdict against him, get the benefit of it. Not only did appellant make the question too late, but it is questionable whether the occurrence referred to was not much more apt to have prejudiced the defendant before the jury than the plaintiff."

Other cases holding that where no objection was made at the time, the error of improper remarks can not be taken advantage of later on, are: *Kriss v. Union Pacific R. R. Co.*, 100 Neb., 801; *Mulcahy, etc., v. National Surety Co.*, 153 N. Y. Sup., 370; *Schwall v. Quitman Oil Co.*, 94 S. E., 64 (Georgia); *Whaley v. Vannatta*, 77 Ark., 238; and other cases in the annotation to the text in Second Ruling Case Law, at page 438.

The conclusion to which the court has arrived on this point is that inasmuch as defendant's counsel did not in terms "object," but only "excepted," and inasmuch as the court took notice of his "exception," and upon being questioned by the court he stated that he wanted no ruling from the court upon his exception, (that is, in effect saying that he did not want the court to construe the "exception" as an "objection" and rule upon it) that the error, if any, has not been properly saved by the defendant, and that it is too late after an adverse verdict has been rendered to ask a ruling for the first time upon the question on a motion to set aside the verdict. Whether the court should disturb this verdict notwithstanding the state of the record is discussed in connection with the third ground upon which a new trial is asked.

As to the exclusion of answers in the deposition of Dr. Gillespie who examined the plaintiff shortly after the accident occurred, out of which this action arose. In this deposition offered by defendant, this question was asked:

"Q. What, if anything, did you say to the people who controlled the hospital, in relation to her injury?"

There was an objection to this question and the court sustained the objection on the ground that it was clearly immaterial and incompetent. The answer in the deposition, which was not read to the jury was:

"I told them that she was not injured in my judgment, and that I did not like her conduct in the case; that I was satisfied that no great injury had been inflicted."

The deposition shows that the plaintiff, at the time the deposi-

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tion was taken, objected to the question when asked, and moved to strike out the answer.

The next question in the deposition was:

“Did you ever have a conversation with the plaintiff in which you said that to her?”

and the answer was:

“Yes, sir; yes sir, I did, more than once.”

Counsel for the defendant asked the court to permit him to read the answer to the first question in connection with the answer to the second question, and the court refused the request.

Upon reflection, the court is still of the opinion that its ruling was correct in this respect,—for these reasons:

1. Plaintiff's counsel duly objected to the first question at the time the deposition was taken, and duly moved to strike out the answer thereto at the time it was given, and the objection and motion were noted in the deposition. The defendant, therefore, was duly advised as to the objection at the time.

2. To have permitted the answer to the first question to be read in conjunction with the answer to the second question would not only have permitted an answer that was unresponsive, but also would have permitted to have gone to the jury the statement contained in his answer that Dr. Gillespie had made to third persons. The only effect it would have had would have been to show that Dr. Gillespie had made these same statements to third persons, and it is clear that a witness' testimony can not be strengthened by showing that he had made unsworn statements to the same effect to other persons prior to testifying.

3. All the substantial part of this answer was contained in answers to other questions that were permitted to be read to the jury. Dr. Gillespie was asked:

“What, if anything, did you say to her in relation to that,”
and he answered:

“I told her she was not much hurt and that she should control herself and get the idea out of her head, and that there wasn't any injury.”

This answer and question was allowed to be read to the jury.

Third Ground. That the verdict is excessive and was rendered under the influence of passion and prejudice.

Inasmuch as the analysis of the evidence necessary in the discussion of this claim of error is equally applicable to the defendant's claim that the verdict is against the weight of the evidence and that counsel for plaintiff was guilty of misconduct in argument, of such a character as to justify the court in granting a new trial, notwithstanding the fact that the error was not reserved, the court will discuss these three claims together.

The plaintiff testified that she was in the act of alighting from one of the defendant's street cars that had come to a stop on her signal, at a regular stopping place; that she had one foot on the floor of the body of the car and the other on the running-board, when the car gave a sudden lurch which threw her to the street, whereby her head and back were injured. She was corroborated in this testimony by Miss Troup, who was in company with her at the time, and was arranging to leave the car after plaintiff.

The defendant produced no witness to testify as to the accident. The plaintiff notified the defendant by letter the next day after the accident, and by stipulation of counsel it was agreed that the defendant had inquired of its motormen and conductors following the accident and that none of them knew of any accident having occurred to any one at that time and place. The decision of the question of whether any such accident occurred depended therefore entirely upon the credibility of the plaintiff and the witness, Miss Troup. The question of credibility was left to the jury and the jury manifestly found that they were worthy of credit, and inasmuch as there was no impeaching evidence of any sort, the court would not be justified in disturbing the verdict for the plaintiff by substituting its opinion, if it had any, contrary to that of the jury on the credibility of these witnesses.

This leaves as the only question in the case, whether the jury, actuated by passion and prejudice, rendered a verdict for an excessive amount.

In approaching this question, the court takes for its guidance

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the rule stated by Judge Thurman in the case of *McGatrick v. Wason*, 4 Ohio St., 566, at 575, as follows:

“Should we disturb this finding? If it is clearly wrong we must do so; if we only doubt its correctness, we must let it alone. In *French v. Millard*, 2 Ohio St., 53, this court said: ‘We are not satisfied that the verdict of the jury was right. But this is not enough. A mere difference of opinion between the court and the jury, does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact. It must be clear that the jury has erred, before a new trial will be granted, on the ground that the verdict is against the weight of the evidence.’ Now, if this is the rule, as it undoubtedly is, even in the court where a cause is tried, and before whom the witnesses appeared and testified, *a fortiori*, ought it to be the rule, when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement.”

The plaintiff testified that at the time of her injury she was a student nurse about twenty-five years of age; that her health had been perfect to that time; that as a result of this accident her head and back were injured, she was confined to the hospital for practically three months, and since the accident, had suffered great physical pain, including headaches, and that she was still suffering at the time of trial; that prior to this accident she had not suffered at her menstrual periods, but since then she had had constant trouble in that respect; and that in February, 1918, an operation was performed upon her to relieve her condition.

The plaintiff was corroborated as to her prior good health by Miss Troup, Dr. Kerraker and Dr. Onderdonk.

Dr. Kerraker performed the operation upon her in February, 1918, and he testified that at that time she had inflammation of the uterus and an abscess in the cul-de-sac-back of the uterus, and that he removed both ovaries and right tube. He testified that in his opinion the inflammation of the uterus and the abscess in the cul-de-sac back of it were the result of the blow on the back, and that also the condition of the tubes could have resulted there-

from. He testified that a certain condition of the ovaries, which he described as cystic, did not result from the blow on the back. He further testified that as a result of the operation which he performed, it would be almost impossible for the plaintiff to become pregnant.

Dr. Onderdonk, who treated the plaintiff in conjunction with Dr. Kerraker, over a considerable period, and who knew her prior to the date of this accident, testified that in his opinion her changed physical condition was the result of the injury to her head, back and spine, and that the condition would be permanent.

Dr. Pope, who testified that he had been practicing medicine for twenty-seven years, was a graduate of the University of Louisville, and a post-graduate of other schools in this country and Europe, and was a specialist on nervous and chronic diseases and had been operating a private sanitarium for twenty-three years, said that he first examined the plaintiff in September, 1916, and at that time found her extremely nervous, with a very weak and rapid pulse, prostrated, with the muscles of the nape of the neck and back of the head rigid, an extremely tender spine, especially in that part at the junction of the lower ribs and just back of the hips; that he found the joint between the large hip bone on the right side and the lower part of the spine dislocated, swollen, and very tender; that he found the female organs displaced downward, the right ovary enlarged and tender and the right tube connecting the ovary with the womb enlarged and inflamed; that a week after the first examination he made a second examination in conjunction with Dr. Kerraker, and found practically the same condition to exist; that in November, 1917, he again examined her and he described the symptoms which he found, showing that her condition had become worse, and particularly that the female organs were in a much worse condition. He testified that in his opinion all these conditions resulted from the injury which she had received to her back and head when falling from the street car.

There was additional testimony of a circumstantial and corroborative character offered by the plaintiff.

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Immediately after the accident, the plaintiff was examined by Dr. Gillespie, and his testimony offered by the defendant, was that while the plaintiff complained greatly of pain and suffering, he was able to discover no objective injuries of any sort.

During the progress of the trial, the defendant had the plaintiff examined by Dr. Bonifield, who testified that in his opinion the condition of the ovaries was not attributable to a blow on the back, and that the plaintiff's pain and suffering, which he recognized to exist at the time of his examination, was the result of adhesions caused by the operation and not by the accident.

All this evidence was submitted to the jury and it awarded a verdict in favor of the plaintiff for \$7,583. In arriving at the result the jury manifestly placed faith and credit in the testimony of the plaintiff's witnesses. The credit of none of these witnesses was impeached, and the court can not say that the jury was wrong in its conclusion in this regard.

It is contended, however, that the misconduct of Mr. Anderson in argument was such that the court should grant a new trial in the interest of justice, notwithstanding the record is such that a reviewing court could not pass upon the question of his alleged misconduct. It is contended that this motion is addressed to the trial court and that it has the power to grant a new trial and correct any manifest injustice that has been done.

This, of course, is correct, but this power of the trial court can be rightfully exercised only in accordance with established legal principles. It is not a power to be exercised arbitrarily. Unless the court can say that the error complained of not only exists, but that it is prejudicial to a substantial degree and frustrates the ends of substantial justice, it is the duty of the court to disregard it.

Examining Mr. Anderson's argument, we find that the first claim of misconduct is in his use of the expression, "poor girl," in referring to the plaintiff. At the time he used this expression he was addressing his argument to the opportunity of the defendant to disprove any statements made by the plaintiff. It was in evidence that the plaintiff had notified the defendant on the day

following the accident, and that on various occasions the defendant's claim agents had called upon her at one place or another. In discussing this situation Mr. Anderson said:

"But you could have all this time—three years—your claim agents were camping on her trail in a distant city, or her home; calling her to her front door to talk to her; you knew whether she had been at work or not. I dare say now that you have known almost every step she has made, almost every dollar that poor girl has earned you have known of it."

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It was also in evidence that the plaintiff had become a graduate nurse and had done some work; loss of wages and impaired earning capacity was in evidence, and in the light of this evidence, the court can not say there was any impropriety in the language used. The characterization of the plaintiff as a "poor girl" does not seem to the court to refer primarily to her poverty, if it existed, but rather to the condition in which she was as the result of the physical injuries claimed to have been inflicted upon her.

Mr. Anderson then passed from that particular subject of comment and commented on various subjects, and finally came to the discussion of the amount of compensation which should be awarded the plaintiff, and in doing so, used this language:

"You can not give her enough money to pay her for her suffering. You can bring the entire railway company in here, you can bring the bonds of the railway company in here, if you had it you can bring all the rolling stock of the railway company in here, you can bring its magnificent valuable franchise in here, and you can lay them all down at this girl's feet and say, take it, take it, and she will say to you, only give me back my good health * * * . Why she wouldn't want it. Her young life has been wrecked," etc.

It was admitted in the pleadings that the defendant was a common carrier of passengers and operated cars over Reading road in Cincinnati. It necessarily follows that it had a franchise to do so. It does not seem to the court that it was improper for the

plaintiff's counsel in giving his estimate of the amount of damage which the plaintiff should be awarded, to refer to the property of the defendant.

It was in evidence that the defendant was a railway company; that it had rolling stock; that it operated its cars over the public streets; and for counsel to say that the value of all these things was not sufficient to compensate the plaintiff for her injuries seems to the court to be a legitimate but extravagant statement of the plaintiff's right of compensation. She was limited by the prayer of her petition to \$30,000.

In referring to Dr. Pope, Mr. Anderson in arguing that he should be believed, placed his argument in the form of his personal opinion of the kind of a man Dr. Pope is. In other words, he said:

"I want to stand here and tell you, gentlemen of the jury, that there is not a higher class man in the state of Kentucky, in the state of Ohio, or in the United States than Curran Pope, the great specialist of the city of Louisville.

Of course, it is outside the bounds of legitimate argument for counsel to testify as to his personal knowledge of the credibility of a witness. In this case, however, Dr. Pope stood unimpeached, and the uncontradicted evidence was that he had practiced medicine in Louisville for twenty-seven years, was a graduate of the University of Louisville and a post graduate of other schools in this country and Europe, and was a specialist in nervous and chronic diseases for twenty-three years. Now, with that as a basis, counsel for plaintiff would have been entirely within the bounds of legitimate argument to have called the jury's attention to the testimony as to Dr. Pope's position and qualifications and to have argued that the unimpeached testimony of such a specialist was trustworthy and should be believed.

It seems to the court that no prejudice resulted to the defendant from the mode of presenting the qualifications of Dr. Pope to the jury, and that on this point this case falls within the rule stated in the companion case to *Driscoll v. Cincinnati Traction*

Co., 88 Ohio St., 150 at 155. In that case the prosecuting attorney, in his closing argument, stated that shortly before the trial was entered upon, counsel for the accused were in the neighborhood interviewing persons who were supposed to be informed as to his presence in that neighborhood at the time of the assault with a view of calling them as witnesses. There was an objection to this line of argument, and in discussing it the court said, at page 155;

"There was no testimony in the case whatever to show that they took any improper steps to secure testimony. In the closing argument on behalf of the state to the jury, as we gather from a record that does not seem to have been very carefully prepared, counsel for the state made some insinuations against the propriety of the conduct of adverse counsel in that behalf. He was engaged at the time in pressing upon the attention of the jury the efficacy of suggestion in starting the belief that one has observed what in fact he has not observed and that he remembers what in fact he does not remember. The psychological law suggested is within the observation of all of us and comment upon it was strictly within the function of counsel for the state. To the proper effect of legitimate comment upon that subject no force would be added by insinuations against the propriety of the conduct of counsel for the accused, and the misconduct appears to be not only an offense against the decorous administration of justice, but without special prejudice to the accused."

So, in this case it appears to the court that the mode adopted in bringing to the attention of the jury the qualifications and credibility of Dr. Pope, constituted an offense against the decorous administration of justice, but without special prejudice to the defendant. Placing Dr. Pope's qualifications and credibility before the jury in the form of the personal opinion of counsel, rather than in the form of a deduction or inference from undisputed evidence did not, in the opinion of the court, add any force to the argument.

It was particularly urged, however, that counsel was guilty of misconduct in referring and emphasizing the fact that plaintiff had been deprived of her ability to become a mother. The

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claim is that there was no evidence to serve as a predicate for such an argument and that the size of the verdict shows that the jury was influenced by it. The court, however, is not prepared to say that there is no evidence from which a legitimate conclusion could be drawn, that the plaintiff was deprived of the privilege of motherhood as a result of this accident. The evidence is that her health prior to the accident was good; that she had no trouble whatever at her menstrual periods; that immediately after the accident the female organs were found to be displaced, inflamed and swollen, and that from that time on she had constant trouble in that regard. The testimony of Dr. Pope is that the condition of the ovaries, resulting in their removal by the operation, was attributable to these injuries. Dr. Kerraker testified that because of the removal of certain female organs, child-bearing by plaintiff was made practically impossible.

Viewing the testimony in this light, the court finds no impropriety in counsel's argument in calling the attention of the jury to these facts. The injuries other than those which deprived the plaintiff of the ability to become a mother, would have justified a verdict in a very substantial sum, and coupled with this additional injury it would be difficult to judicially declare a very much larger amount than that awarded in this case to be excessive. The court can not say the amount of this verdict is excessive.

In the general charge to the jury the court instructed it that the plaintiff was only entitled to such damages as were caused proximately by the defendant's negligence, and defined what the meaning of the term "proximate cause" was. At the close of the general charge defendant's counsel requested the court to charge further upon the question of the injury to the ovaries, for which the plaintiff might be entitled to recover, and the court responding to that request, charged the jury:

"If you find from the evidence that the disease of her ovaries was not caused by the accident, you can not award damages for any sickness, pain or suffering suffered by her on that account, and that same rule, gentlemen, applies to all the other injuries, sickness, pain and suffering that has been testified to in the case.

You must find first whether the sickness, injury, pain or suffering the plaintiff has suffered were the direct and proximate result of the accident, and then if they were, award such damages as will reasonably compensate her for the same. If they did not result proximately and directly from the accident, then plaintiff would not be entitled to recover on account thereof."

The court had already charged the jury that it should not be influenced by passion, favoritism or prejudice for or against the plaintiff or the defendant, in this language:

"You are to consider the evidence impartially and fairly; analyze the evidence and determine where the greater weight of evidence rests, and be guided by that greater weight of the evidence in reaching a conclusion. If the greater weight favors the plaintiff, then your verdict should be for the plaintiff. If the plaintiff has not proven by the greater weight of all the evidence the issues of fact, then your verdict should be for the defendant."

The trial of this case was conducted in an orderly and dispassionate manner. The argument made by Mr. Anderson was not accompanied by any disorder or conduct of an improper character. The only criticism that could be made was and is as to the language used, and his placing his hand for an instant upon the knee of a juror, which act was not repeated, and the court finds under all the circumstances, that no prejudice resulted to the defendant by reason of any impropriety in the argument.

The court is of the opinion that a fair and impartial trial was given to the defendant, that no error prejudicial to it was committed, and its motion for a new trial is therefore overruled.

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Gruic v. Railway.

**ACTIONS AGAINST GOVERNMENT CONTROLLED RAILWAYS
FOR TORT.**

Common Pleas Court of Summit County.

ISAAC GRUIC V. THE BALTIMORE & OHIO RAILROAD COMPANY,
AND WILLIAM G. MCADOO AS DIRECTOR GENERAL OF THE
RAILROADS OF THE UNITED STATES OF AMERICA AND
INCLUDING THE SO-CALLED THE BALTIMORE & OHIO
RAILROAD.

Decided, March, 1919.

*Order Making Director General of Railways—Defendant in Actions
Against Railways under Federal Control—Without Force or Effect
in Cases Involving Torts—Aggrieved Party can not be Compelled
to Accept a Substitute Party Defendant—Constitutional Rights.*

1. The act providing for federal control of transportation systems does not invest the President with authority to release railway companies from liability for negligence, and General Orders 50 and 50a, promulgated by the Director General of Railways and forbidding the bringing of such suits against the railway companies involved and providing that they be brought against the Director General and not otherwise, are beyond the scope of said act and without force or effect.
2. But were such not the case, the constitutional right to maintain an action for injury to the person or property would render such an order invalid.
3. And further, an action by the driver of a vehicle for personal injuries from being run down by a train is a tort, as to which the aggrieved party can not be compelled to accept a substitute party defendant.
4. But under the provisions of Section 11255 General Code, authorizing further parties defendant, the Director General upon his own application and without objection by plaintiff or the defendant railway company, may remain a party defendant in an action for personal injuries suffered on a railway under his control.

Musser, Kimber & Huffman of Akron, Ohio, for plaintiff.

Allen, Waters, Young & Andress, of Akron, Ohio, for defendants.

TREASH, J.

On December 28, 1918, plaintiff, Isaac Gruic, filed his petition in this court claiming damages for personal injuries and loss of property in the sum of \$25,580, against the Baltimore & Ohio Railroad Company and the Director General of Railroads of the United States of America, for being struck and run into on February 4, 1918, by a train while driving a bob sled across the Tenth avenue crossing of said railroad in the city of Akron, and bases his cause of action against the defendants upon the negligence of the defendants in running their train on and over said crossing at a high and dangerous rate of speed within the corporate limits of the city of Akron, and without giving timely warning of the approach of said train to said crossing, and without maintaining gates or barriers or other means of preventing such injuries at said crossing.

The crossing is alleged to have been located in a populous and densely populated part of the city, and much frequented by traffic, and the relative positions of the surroundings grounds, streets, tracks and embankments and roads are such that a person approaching said railroad tracks is unable to hear or see a train approaching until very near said crossing.

To this petition defendant, the Director General of Railroads of the United States, has filed a demurrer on the ground and for the reason that there is a misjoinder of parties defendant.

On December 28, 1917, the President, in pursuance of the act of Congress of August 29, 1916, took control of the transportation systems of the country as a war measure, effective January 1, 1918.

March 21, 1918, Congress passed what is known as the "federal control act" providing for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes.

October 28, 1918, the Director General of Railroads, by authority of the President, issued General Order No. 50, directing that suit should no longer be maintained against the railroads, but should be brought against the Director General of Railroads alone.

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January 11, 1919, an amendment made to this order known as General Order No. 50-a, was issued providing as follows:

“General Order No. 50, issued October 28, 1918, is hereby amended to read as follows:

“It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.”

Under favor of this order, the Director General of Railroads of the United States files his demurrer and asks that this action be dismissed as to defendant the Baltimore & Ohio Railroad Company.

Authority for making this order is claimed under a provision of Section 10 of the railroad control act, reading as follows:

“Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether under state or federal laws or at common law, except insofar as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President.”

Two questions are presented by this demurrer:

- I. Has Congress the right to enact this legislation assuming that it vests the power claimed on behalf of the defendant.
- II. Does the federal control act of Congress grant this power to the President.

We will consider the latter of these questions first.

Admittedly, the chief executive has no such power unless bestowed by appropriate enactment of Congress. Whence then comes this power?

The Director General invokes that portion of Section 10 of the railroad control act passed March 24, 1918, quoted above, and maintains that the clause:

“That carriers while under federal control shall be subject to all laws and liabilities as common carriers—except insofar as may be inconsistent with any order of the President.”

not only provides how the laws and liabilities of railroads may be changed, but grants unlimited powers to the President to repeal and suspend all laws and liabilities against railroads, and bar any suits against them in the courts.

In other words, the conclusion from this construction is that Congress has abdicated and surrendered to the President all its functions of lawmaking as regards the railroads, and the President acting upon this presumption has decreed through his Director General of Railroads that the railroads, while under federal control, must no longer be sued in the courts.

With this contention we can not agree.

1. The first rule of construction of a statute is that it must be construed as a whole. Some parts can not be selected and others disregarded.

In the language of Mr. Chief Justice White, in *VanDyke v. Cordova Copper Company*, 234 U. S. 188-191; 34 Sup. Ct. 884-885; 58 L. ed. 1273:

“We may not, in order to give effect to these words, virtually destroy the meaning of the entire context; that is, give them a significance which would be clearly repugnant to the statute looked at as a whole, and destructive to its obvious intent.”

The various provisions of an act should be read so that all, if possible, may have their due and conjoint effect without repugnancy or inconsistency. *New Lamp Co. v. Ansonio Glass Co.*, 91 U. S., 656-662; 23 L. ed. 336; *Aaron v. U. S.*, 204 Fed. 943.

Applying this cannon of construction to the act as is our duty, how untenable is the contention claimed.

The very next sentence of Section 10 reads:

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“Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government.”

As if to remove all possible doubt as to the character of the control that was to be exercised by the President, Congress specifically said “Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law.”

And then further as settling the question which had already been raised by the railroads, that by federal control they had been relieved of responsibility for their acts while under federal control, the statute next provided:

“and in such action at law or suit in equity against the carrier, no defense shall be made thereto on the ground that the carrier is an instrumentality or agency of the Federal Government.”

This act was passed March 21, 1918. The President had already taken control of the railroads December 26, 1917, under authority of the act of August 29, 1916, and already the railroads were trying to remove actions from the state to federal courts on the ground of federal control.

The very next sentence of this section 10 provides:

“Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier.”

Can it be presumed that Congress intended to grant to the President power to repeal these very definite declarations of right to sue carriers in the courts? To do so would be to eliminate all of the act after “with any order of the President.”

2. Upon a reading of the whole act, it is very evident that this phrase “any order of the President” does not confer

authority and power to change the laws and liabilities of carriers, but designates *how* the power that is specifically delegated in other parts of the control act shall operate and modify the existing laws and liabilities of carriers.

The second paragraph of Section 10 designates in specific and appropriate language the laws and liabilities of common carriers which the President may make or change by his order:

“That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations and practices shall not be suspended by the Commission pending final determination.”

The whole act provides for “control,” not for ownership.

The third paragraph of Section 10 further enlarges his authority over rates, fares, etc., but nowhere in this section or any other of the entire act, is any attempt made to grant the President authority to release the railroads from any liabilities or exempting them from answering in the courts as to their conduct.

Each separate section of this act designates clearly the power and authority of the President. The first authorizes the President to make an agreement with the railroads. The second determines what the President may do, if an agreement is made. The third determines compensation by boards or a court of claims. The fourth authorizes the President in certain contingencies to increase compensation. The fifth prohibits paying of dividends without the President's approval, and so on, but in no one of the sixteen sections is a word said giving the President authority to relieve a railroad from suit in the courts.

3. Granting that the phrase “with any order of the President” may have the intent claimed, still under the rule that when in conflict a general provision in the statute must give way to a specific provision as stated by Mr. Justice Day in *United States v. Stevenson*, 215 U. S. 190-197:

“The rule which excludes other remedies where a statute creates a right, and provides a special remedy for its enforcement, rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect.”

See also *Rogers v. United States*, 185 U. S., 83; *in re Anderson* 214 Fed., 662; *Colonial Navigation Co. v. N. Y. Co.*, 50 L.C.C. 625.

Applying this principle to the federal control act, it follows:

(a) That Congress intended by so specifically providing to maintain the right of suit against the railroads, and did not purpose to delegate power of any nature to the President to disturb it.

(b) If Congress had intended to grant such power it would have been easy to have expressed it in appropriate language, and the omission is fatal to the presumption of the Director General.

Since then the only foundation for the Director General's order is the assumed general authority under the phrase “with any order of the President,” and the right to sue is specifically provided by the act itself, it would seem necessarily to follow that the specific provision must be regarded as controlling, and the general provision must be considered as not intended to operate where specific provisions apply.

4. The right to maintain an action for injury to personal property is a constitutional right, and Congress can not legislate away the right, and much less can they delegate such rights to another.

“A right of action to recover damages for an injury is property, and has the Legislature power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor Legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged.”

This proposition was announced by the Supreme Court in *Angle vs Chicago, St. Paul Etc. Railway*, 151 U. S., 19; 14 Supreme Court, 247.

The plaintiff has set forth a cause of action against the defendant railroad. The demurrer for the purpose of this proceeding admits such cause of action. If the presumption of authority by the Director General in issuing his order No. 50 is correct, then the federal control act in that particular is unconstitutional and void. The result in either event is the same. We prefer to follow the rule that Congress will not be presumed to do an unconstitutional thing, and in lieu of a clear intent to grant the power claimed we must hold that none exists in the act.

5. There are other forciful reasons which lead to the same conclusion.

The only orders the President can make under the largest interpretation of the language of Section 10 are those affecting "*Laws and liabilities as common carriers.*" The action in this case against the defendant railroad is not founded on the laws and liabilities of common carriers. It is not an action by a passenger or shipper or patron of the railroad against the railroad as a carrier, but of a stranger for damages for a tort, and the action rests, not on the liabilities of a carrier, but on the general laws of negligence. Plaintiff is entitled to his day in court, and he can not be made to accept a substituted party from whom to collect his damages.

6. An individual can not maintain an action against a sovereign state without its permission. We have been unable to find any such enabling provision in the federal control act or other legislation. A proceeding against the Director General is, in substance, a suit against the United States, and accordingly can not be maintained except by express permission of the Government. *Marbury vs Madison*, 1 Cranch (U.S.), 137; *Louisiana v. Garfield*, 211 U. S., 70; *Louisiana v. McAdoo*, 234 U. S., 627; *New Mexico v. Lane*, 243 U. S., 52.

Whatever may be the construction placed on Section 10, it certainly contains nothing evidencing the consent of the United States to be made a party to law suits.

7. It has been suggested that that part of Section 9 reading "and the President in addition to the powers conferred by this act, shall have and is hereby given such other and further powers

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necessary or appropriate to give effect to the powers herein and heretofore conferred," enlarges the authority of the President. The language of this clause negatives such interpretation, because it specifically limits the President's powers to those "herein and heretofore conferred."

The fact that the Director General may operate the railroads, collect the income, pay expenses, and otherwise control the roads, does not necessarily mean that they can be exempted from liability on that ground, any more than on the ground that in normal times when the Government controls the rate of fare which may be charged, the use and kind of equipment, the number of hours of labor of an employee, or a hundred other regulations on carriers which the Government has seen fit to impose. The act wisely provides for adequate compensation to the carriers. If the liability which may be imposed in this case is so for which the Government should compensate it, there is an effective and adequate remedy provided for securing it, but there is no remedy or way by which a third party can sue the Government or recoup his loss, even though the Director General may try to provide one.

8. From this view of the case it would seem necessarily to follow that the Director General of Railroads must be dismissed as a party defendant herein, but since the Director General has specifically asked to be made a party in these actions, and ultimately he may have to consider any judgment rendered in the case as a part of the liabilities for which the railroad may seek compensation, and since neither the plaintiff nor the defendant railroad are objecting, there seems no good reason why he should not be permitted to remain as a party defendant in this action.

Parties other than those necessary to settle the immediate question, and yet whose rights depend on the same question, or who may be directly affected by it, may, and often should be made parties to the suit. This practice of permissive joinder of parties is especially sanctioned by Section 11255 of the General Code of Ohio: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff."

The rights of the plaintiff, however, can not be determined in an action solely against the Director General of Railroads.

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Plaintiff has set forth a cause of action against the Baltimore & Ohio Railroad Company in his petition, and if he can establish it by his proof neither the President of the United States, nor his Director General, nor any other man can pardon or grant immunity to this railroad.

Accordingly, the demurrer of the defendant, the Director General of Railroads, is overruled.

LIABILITY FOR INJURY TO AUTOMOBILE IN COLLISION.

Common Pleas Court of Hamilton County.

S. M. HENDERSON v. EDWARD WERTHHEIMER.

Decided, February 6, 1919.

Negligence—In the Operation of an Automobile—Resulting in Collision with a Machine Just Ahead—Cause of the Accident as Indicated by Surrounding Circumstances.

Where an automobile is damaged by being struck by a machine in the rear, and the owner of the second machine defends on the ground that his machine was driven into the first machine by being struck by a third machine in his rear, and there is no further testimony relative to the third machine, a reviewing court will not disturb a judgment rendered in favor of the owner of the first and against the owner of the second machine, where it appears to have been based on the theory that the heavy second machine, at a dead stand with the brake set, could not have been driven forward by a rear end collision with such force as to move the first machine forward a distance of ten to fifteen feet and cause damage to it while the second machine received no damage.

Robertson, Buchwalter & Oppenheimer and Harry Neal Smith,
for plaintiff in error.

Cohen, Mack & Hurtig, contra.

GEORGE HEGAN, J.

This cause came into this court on error to the municipal court.

The plaintiff below, defendant in error herein, was the owner of an automobile. On July 6, 1918, he was driving his machine along the Covington and Latonia pike, returning from the Latonia race track. The traffic was very congested, there being several hundred machines stretched in a line along the pike in close proximity to each other. The traffic was stopped for some undisclosed reason when the machine of defendant was about a mile and a half from the race track, and when thus stopped, the machine of plaintiff in error, which was immediately behind that of defendant in error, collided with that of defendant in error and pushed his machine into the machine immediately ahead, causing damage to the defendant in error's machine.

At the time the machines were stopped, the defendant in error had set the brakes on his machine and both he and a companion, who was in it, had stretched out their hands as a signal to the machine behind to stop.

The plaintiff in error admitted the collision, but offered evidence to the effect that when the machine ahead of him had stopped he stopped also, but that a machine immediately behind his crashed into the machine and catapulted it against the defendant in error's machine.

This substantially comprises all the evidence offered in the case, except evidence as to the nature of the damage and the cost of repairs to defendant in error's machine.

The case being submitted to the court below, without the intervention of a jury, that court found in favor of the plaintiff below, defendant in error herein, and entered up a judgment for him.

The plaintiff in error now contends that this judgment should be reversed on the ground that it is against the weight of the evidence, the theory being that, while a presumption of negligence, under the circumstances, might have arisen by reason of the manner in which this collision occurred, that presumption was rebutted by the uncontradicted evidence offered by the plaintiff in error, to the effect that some agency over which he had no control caused his machine to be catapulted into the machine of defendant in error. He relies largely on the case of

O'Donohue v. Duparquet et al, 123 N. Y. Supp., 193, wherein the second paragraph of the syllabus is as follows:

"Where plaintiff's automobile, standing at the side of the street, was struck by defendant's truck, the rule of *res ipsa loquitur* has no application, after defendant proves that, while its truck was being carefully driven along the proper side of the street, it was struck from the rear by a street car and thrown against the automobile; but the burden is on plaintiff to show negligence, as in other cases."

He contends that the evidence below clearly shows how the accident happened, which, if true, would relieve the plaintiff in error of any responsibility for the damages caused to the defendant in error's machine.

But the case of *Donohue v. Duparquet et al*, *supra*, is clearly distinguishable from the case at bar. In that case, the street car company was made a party defendant and the plaintiff's own evidence established the fact that the accident occurred entirely through the negligence of the street car company, and this evidence of plaintiff as to how the accident happened completely rebutted the presumption of negligence on the part of Duparquet Company arising under the doctrine of *res ipsa loquitur*.

In the case at bar, however, the trial judge had on the one hand the presumption of negligence arising from the manner in which the collision occurred, and the evidence offered by the plaintiff in error, by which he sought to be exonerated from blame for the collision. In determining the truth or falsity of the defense set up by plaintiff in error, he must have taken into consideration all the surrounding circumstances. There was no attempt made in this case on the part of the plaintiff in error to bring in the driver of the machine which he claims struck his machine and caused it to be catapulted against that of defendant in error. There was evidence that the defendant in error's machine had stopped from seven to fifteen feet in the rear of the machine immediately in front of it; that his brakes were set; that he had a bumper on the rear of his machine, and

that notwithstanding that fact, the machine of plaintiff in error pushed through the rear bumper, damaged the rear tire and its carrier and caused some damage to the rear system.

The trial judge, in passing upon the question of the preponderance of the evidence, was compelled to consider the probability or improbability of plaintiff in error's story and might have well disbelieved it. The fact of a heavy machine, at a dead stop, being driven, by reason of a rear end collision, into another machine with such force as to drive that other machine a distance of from seven to fifteen feet and causing the damage to it that it did, without suffering any injury itself, might have appealed to the trial judge as being too improbable to believe. This was evidently the state of his mind when he decided the case in favor of the defendant in error and entered up judgment for him. And upon an inspection of the record I am inclined to believe that he was correct in his judgment and that it was neither against the weight of the evidence nor contrary to the law of the case.

The judgment will therefore be affirmed.

COSTS IN ABANDONED CONDEMNATION CASES.

Common Pleas Court of Franklin County.

WILLIAM H. ENGLISH V. NORFOLK & WESTERN RAILWAY CO.*

Decided, December 16, 1918.

Appropriation—When Costs and Expenses of Defendant Land Owners Must be Paid by the Plaintiff Company.

1. The provision of Section 11060, that in case of abandonment by a railway company of an appropriation proceeding the amount of the defendants' costs, expenses and attorney's fees shall be paid into court, has reference to cases in which an abandonment of the proceedings has been voluntary on the part of the company.
2. Where the finding of the court in its entry of dismissal of such a proceeding is to the effect that the plaintiff company contends it requires for the purpose of its railroad more of the real estate belonging to the defendants than is described in the petition, a purpose is manifested on the part of the company to abandon the proceeding without prejudice, and the character of the dismissal is not changed by failure of the company to obtain the benefit of an amended petition.

*Smith W. Bennett and Barton Griffith, on behalf of plaintiff.
Bannon & Bannon, and Booth, Keating, Pomerene & Boulger,
contra.*

KINKEAD, J.

The original proceeding was one in the probate court in condemnation. On July 12, 1918, the same was dismissed on motion without prejudice at the costs of the plaintiff, the railway company.

July 23, 1918, the English heirs filed a motion under Section 11060 to hear and determine the amount of their costs, expenses and attorneys' fees incurred in the proceedings. The court held that the heirs were not entitled to such relief. Error is prosecuted from this order.

*Affirmed by Court of Appeals.

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The right of property owners to an allowance for costs, expenses and attorneys' fees under Section 11060 seems to depend upon the nature of the abandonment by the railway Company. The statute reads:

"The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses and attorneys' fees, as found by the court."

This provision also authorizes the court to enter judgment for the amount of costs, expenses and attorney fees incurred.

The controversy presented by the record is whether the abandonment by the railway company must be voluntary in order to give rise to the right of property owners to demand such payment.

The railway company contends that it must, and that if it was involuntarily compelled to abandon the proceeding, it can not be made to pay.

The property owners also make the claim that the company may be required to pay even when there has been a compulsory abandonment. *Railway v. Warehouse Co.*, 53 W. L. Bull., 13 (Warner, J., Hamilton County Court of Insolvency), is cited. That was a case of an abandonment by reason of an adverse ruling of the Supreme Court which rendered it impracticable to use the property if appropriated. In effect, however, that seems to have been a voluntary abandonment.

It seems clear that the statute contemplates a voluntary act of dismissal of the proceeding. The purpose is to require the public service corporation to reimburse property owners for costs and expenses incurred in the conduct of the proceeding where it is voluntarily discontinued. The requirements of Section 11060 contemplate that the company shall pay such obligations, both where the proceeding passes to final judgment, as well as when it shall end by voluntary discontinuance. The condition upon which it may be dismissed is that the plaintiff shall pay the costs and expenses.

The entry of dismissal recites that the cause first came on to be heard upon the motion of the defendants to dismiss the pro-

ceeding. Thereupon plaintiff asked leave to refile the amended petition from the files which was denied. Thereupon plaintiff asked that the case be set down for hearing upon the petition.

Then the entry provides:

“And it appearing to the court that the plaintiff contends that it requires from the defendants * * * for the purposes of its railroad real estate in addition to that described in the petition, this proceeding is hereby dismissed without prejudice and without record at the costs of the plaintiff.”

There is here clearly manifest a purpose on the part of the railway company to voluntarily abandon this proceeding, in which it had been deprived of an amended petition, so that it could “without prejudice” if it chose to do so, commence a new proceeding. The incident of losing the benefit of an amended petition can not be so considered as to change the character of the act of dismissal.

The entry of the judgment effected a virtual abandonment of the *case* and *proceeding*, and the property owners were entitled as a condition of such dismissal without prejudice to an order and judgment for costs, expenses and attorneys’ fees.

Judgment reversed.

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Routson, Admr., v. Jackson et al.

**RECOVERY BY WIFE'S ADMINISTRATOR FROM THE ESTATE
OF HER HUSBAND.**

Common Pleas Court of Montgomery County.

T. A. ROUTSON, ADMINISTRATOR, v. MARTIN W. JACKSON ET AL.*

Decided, July 19, 1918.

*Money Loaned by Wife to her Husband from her Separate Estate—
Intention to Create the Relation of Debtor and Creditor Shown—
Debt to Become Due at the Death of the Husband—Interest Charg-
able from that Date only—Case One in Equity notwithstanding
Prayer of the Petition.*

1. Money given by a wife to her husband from her separate estate in 1867, 1868 and 1872, the circumstances indicating an intention to create the relation of debtor and creditor, is recoverable by her or by her estate under the legislation of that period:
2. Where a petition filed states a case which entitles the plaintiff to an equitable remedy but furnishes no basis for legal relief, the court may disregard the prayer if it be for a judgment at law, and grant the appropriate equitable remedy.

*E. H. and R. A. Kerr, J. A. Kerr, Lenz, Sigler, & Denlinger,
and Carr, Allaman, Retter & Murr, for Plaintiffs.*

W. A. Haines and Mattern & Brumbaugh, contra.

SNEDIKER, J.

This action is brought by the plaintiff against the defendants for the recovery of \$3,200, with interest on \$1,500 thereof at six per cent. from March 23, 1867, to May 1, 1872, with interest on \$700 thereof at six per cent. from February 14, 1868, to May 1, 1872, and with interest on \$1,000 thereof at six per cent. from Jan. 6, 1872, to May 1, 1872, and for six per cent. interest with annual rests on the total amount found due on May 1, 1912— from that date to date of payment.

The case was begun to a jury and after the taking of some of the testimony, by the agreement of all parties, in order that the

* Affirmed by the Court of Appeals, April 30th, 1919.

case might be more fully and carefully considered before determination, the jury was excused and the case proceeded as if originally to the court. It is now before us on the pleadings and the evidence for a finding on the issues involved.

Plaintiff's claim, as stated in his petition, arises from four causes of action which, in short, are as follows:

First. He claims that there is due and owing to him, as the administrator of the estate of Catherine Jackson, from the estate of Jesse L. Jackson the sum of \$1,500 with interest at six per cent. from the 23rd day of March, 1867 for money had and received on said date by said Jackson for the use and benefit of Catherine Jackson, his wife, and which Jesse L. Jackson orally promised and agreed to pay to Catherine Jackson with interest upon his death.

Second: He claims that there is due and owing to his as such administrator from the estate of Jesse L. Jackson, deceased, the sum of \$700 with interest at six per cent. from the 14th day of February, 1868, for money had and received on said date by the said Jesse L. Jackson for the use and benefit of Catherine Jackson, his wife, which Jesse L. Jackson orally promised and agreed to pay to his wife with interest upon his death.

Third: He says there is due and owing to him as such administrator from the estate of Jesse L. Jackson, deceased, the sum of \$1,000 with interest at six per cent from the 19th. day of January, 1872, for money had and received for the use and benefit of Catherine Jackson, his wife, and which Jesse L. Jackson orally promised and agreed to pay to Catherine Jackson with interest upon his death.

Fourth: He says that on or about April —, 1872, after the death of his wife, Jesse L. Jackson promised and agreed to and with Frederick Yount, who was the grandfather of Catherine Jackson and who had advanced the money referred to in the first, second and third causes of action of said petition, that he would pay the moneys to the estate of Catherine Jackson at his death with a greater rate of interest than a guardian would be required to pay. This statement was made, as claimed in the fourth cause of action, at a conference had with Frederick Yount where

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he expressed an intention to have a guardian appointed for the children of Jesse L. Jackson who eventually would become interested in the moneys borrowed by Jackson from his wife. At the time, as claimed by the plaintiff, guardians using their ward's money paid six per cent. interest with annual rests.

On account of the foregoing, plaintiff asks judgment as hereinbefore recited. With respect to the several causes of action set up in plaintiff's petition, the defendants enter a general denial.

It appears from the evidence that Jesse Jackson, the defendants' decedent, was married to a granddaughter of Frederick Yount and after such marriage resided on a farm along the Stillwater river, which farm he afterwards traded for one along the Miami river; and this second farm was subsequently part of a deal for a farm bought by him in Darke county. At the time of each of the several purchases and trades made by Jesse L. Jackson it became necessary for him to have an additional amount of money, and on these occasions he with his wife visited Frederick Yount, Catherine Jackson's grandfather, and she secured, first, \$1,500; second, \$700; and third, \$1,000; at or about the several times claimed in the plaintiff's petition, and turned this money over to her husband to be used in these transactions, and it was so used.

The testimony shows that Jackson's wife died, and that subsequent to her death a number of the relatives interested in the children, among whom was Frederick Yount, their greatgrandfather, visited Jackson in Darke county upon the farm where he then was and made inquiry of him in reference to the money which had so been turned over to him by his wife. At that time, as testified to by Mary Smith, his attitude was:

"Q. Was you ever present at any conversation with Mr. Jesse L. Jackson in which he referred to these sumes that he owed to his wife? A. Yes, sir; we went to see him after his wife died and he agreed to pay this to her and her heirs and at his death it was to go to the children." (Record, p. 5.)

"Q. What was said there in relation to it in your presence by Mr. Jesse Jackson, relative to the money that he had borrowed from his wife? A. He wanted to keep it until his death, and he said he would give the children a greater interest than if they had

guardians, and grandpap then wanted to have guardians for the children.

Q. What did he say? A. He said he would give them a greater interest than if they had guardians for the children." (Record, p. 7.)

Afterwards the following conversation was had between Yount and Jackson, as shown by the testimony of Mary Smith:

"Q. Did you hear any other conversation at which Mr. Jackson was present where this money was discussed after you were up there at his house? A. Why, yes. He came down to grandpap Yount's and they talked it over and they agreed to let it stand.

Q. And what did Mr. Jackson say at Mr. Yount's house? A. He asked grandpa to not make any trouble, let him have the money, and grandpa agreed that if he would pay it after his death back to these children he would leave him have it." (Record, p. 10).

"Q: Where and when was that? A. Well, it wasn't only a few days after that, after we had been down there after she died, in a couple of weeks, in a few days he came down to grandpap, and grandpap agreed to let things stand that way." (Record, p. 15.)

As appears from the testimony of Eli Yount, the following occurred on the visit to Darke county:

"Q. What took place,—what you went there for and what he said? A. Which?—About when we wanted to appoint a guardian.

Q. Yes. A. We wanted to appoint him guardian for those children,—three minor children. He said, 'No; I have got this money invested,' and he said, 'I expect to use it my lifetime and then,' he said, 'I will pay them my regular interest at my death and that would be more money to the children than to have a guardian.' " (Record, p. 25.)

"Q. What statement did Mr. Jackson make to you people as to any arrangement he had made with his wife relative to this property? A. He had made arrangements to have that until his death." (Record, pp. 25-26).

From the testimony of Cornelius O'Neil, who was a young man at the time employed by Jackson on the farm, we not only

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have information about the receipt of the money by Mrs. Jackson on two occasions and that it subsequently came into the hands of Jesse Jackson, but there is the further statement that, in a conversation had by O'Neil with Jackson, Jackson said that he had received the money from his wife, that he was to have it as long as he lived to invest, and that it was to be paid back at his death. (Record, p. 39.)

There is an admission in the answer that, as claimed by the plaintiff, a sworn statement of the amount due was presented to the defendants, that a request for allowance was made thereon, and that the defendants refused and rejected the claim.

These being the facts, what is the law of the case? The common law relation of husband and wife had been, prior to 1867, modified in this state by an enlargement of the rights of the wife. The last enactment relating to a wife's rights as to personal property, previous to the first of these transactions, was passed by the Legislature April 3, 1861, by the second section of which:

"Any personal property, including rights in action belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This act shall not affect the title of any husband to any personal property reduced into his possession with the assent of his wife: * * *"

Except the amendment to the act of April 3, 1861, which was passed March 23, 1866, and only related to the estate or interest of a wife, legal or equitable, in real property, there was nothing passed by the Legislature which affects our case until March 30, 1871. The amendment then passed would have a bearing upon plaintiff's third cause of action. It reads (Section 2):

"Any personal property, including rights in action belonging to any woman at her marriage, or which may have come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her

separate labor, or have grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This act shall not affect the title of any husband to any personal property reduced into his possession with the express assent of his wife; provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, full authority shall have been given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit."

In applying these several acts to the facts in this case we, of course, must keep in mind the testimony as heretofore quoted, which shows that the money, which Mrs. Jackson received from her grandfather, she loaned to her husband with the agreement and understanding that he was to invest it until his death; and that thereafter it was to be paid to her or her estate. Under such conditions the husband may not be said to have reduced either the first, second or third amounts delivered to him by his wife to possession. We regard the evidence as both positive and clear and consistent with their relation that it was his intention at the time not to receive the money as her husband but as a debtor. The agreement on his part to repay indicates his relation to his wife in the case. This money, when received from her grandfather, may be said, under the several enactments referred to, to be her separate estate.

"If a wife loans money to her husband out of her separate estate, she has the same right to expect and receive security and repayment and preference in payment, out of his estate, as any other creditor has; although the law will not, from the mere delivery by her of her money to him, or from the permitted receipt by him of her separate income, imply a promise by him to repay her, but will require more, either in express promise or circumstances, to prove that in such matter the husband and wife dealt with each other as debtor and creditor." 7 R. I. (4 Ames), p. 481.

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The requirements here specified are fully met by the proof.

"By the act concerning the rights of married women, passed April 3, 1861, as amended March 23, 1866, the general estate, as well as the separate estate, of a married woman, belonging to her at her marriage, and all her estate, legal and equitable, which may come to her during coverture, by conveyance, gift, devise, or inheritance, or by purchase with her separate means or money, together with the rents and issues thereof, becomes her separate property and under her control, free from the marital rights of the husband at common law over the same." 30 O. S., p. 147.

"It may be said that a married woman can not adequately enjoy her separate property, unless she can make contracts in regard to it. This is true, and hence her power to make contracts, so far as may be necessary for the use and enjoyment of her property, must be regarded as resulting by implication from the statute." 50 Ill., p. 473.

"Money borrowed by the husband from the wife, and secured to her by the note of the husband, given to her at the time of receiving the money, will, after her death, and as between the husband and her estate, be regarded as an equitable claim against the husband; * * *." 24 O. S., p. 11.

"A married women, having a separate estate, may give or lend the income of it, if at her disposal, to her husband, as to any other person." 3 Wharton, p. 48.

In the case of *Pillow v. Sentelle*, 49 Ark. 430, the Supreme Court of Arkansas say, p. 438:

"At common law contracts between husband and wife are void. But in equity a promise by the husband to his wife to repay her a loan *bona fide* made by her to him out of her own separate estate, upon his promise to repay, is obligatory and can be enforced."

In line with the foregoing, see: 10 Peters, 592; 108 U. S. 73; 2 Story Eq. Jur., secs. 1372-3; 51 N. Y., 395; 84 Ill., 144; 77 P. St., 482; 42 Md., 154; 38 Md., 183; 31 Wis., 82; 3 Bush., 155; 70 Ind., 135; 2 Lea., 661; 1 Grant, 468; 40 Pa. St., 90; 45 Pa. St., 530; 24 N. Y., 623, 44 N. Y., 298; 1 Lowell, 543.

If the money so loaned by Mrs. Jackson to her husband was before that time her separate estate, and if, as we have found, there was not a reduction to possession of the same by Jackson but if, on the contrary as we have stated, a condition of debtor and creditor arose as between the husband and wife on account of the loans so made, and if she may recover for and on account of the debt so created, are we entitled in this action to afford her representative relief?

As will be observed from the petition, the action was begun as one at law. It does not appear to us that under the act of 1861, nor under the act of 1871, there was any such change in the relation of husband and wife as gave her the authority to sue at law for recovery. Her remedy, as we view it, remained the same,—one in equity. But whether at this time the representative of Mrs. Jackson is bound to resort to a court of equity or a court of law can make no difference under the reform method of procedure now existing in this state. We are not bound to observe the prayer of the petition and be controlled thereby in reference to the character of case which it seems to indicate the plaintiff intends to present. The allegations of this petition certainly entitle this plaintiff to at least an equitable remedy.

“As a logical consequence of the doctrines that a married woman may sue in equity for the protection of her separate estate, it follows that where distinctions between actions at law and suits in equity and the forms of all such actions and suits have been abolished, one effect has been to give married women a right to sue their husbands on contract as they would any other person.” 5 L. R. A. (n.s.), p. 612.

“When the complaint or petition alleges a case which entitles the plaintiff to equitable relief, but no basis for legal relief is stated, and prays a common-law judgment, but no equitable remedy of any kind, if the case as alleged is proved upon the trial the equitable remedy which is appropriate to it should be awarded. Disregarding the prayer or demand of judgment, the court will rely upon the facts alleged and proved as the basis of its remedial action.” Pomeroy's Remedies and Remedial Rights, Section 83, p. 103.

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The case now being in the hands of the court, the application of this rule is not difficult.

With respect to the interest claimed in the petition we can not on the evidence agree with the plaintiff. We have searched the record and been unable to find that there was an agreement on the part of Jackson to pay his wife interest on the loan from her to him, and we can very well see how this might reasonably be so. The money was invested in the farm or farms upon which the family lived and from which they all derived benefit. Both the common law of the state and the statutory law of Ohio as it existed in 1869 are applicable to this question. Let us remember that the debt of Jackson to his wife was payable at his death.

By Section 3 of the act of 1869 it was provided:

“In all cases other than those provided for in the first and second sections of this act, when money shall become due and payable upon any bond, bill, note or other instrument of writing, bearing date after the passage of this act, upon any book account or settlement hereafter made between parties upon all verbal contracts hereafter entered into, and upon all judgments, decrees and orders of any judicial tribunal for the payment of money arising out of any contract made or other transaction occurring after the passage of this act, the creditor or creditors shall be entitled to interest at the rate of six per cent. per annum, and no more.”

It is the common law that where an obligation to pay money at a certain time is silent as to interest, it will commence only from the time of the debtor's being put in default. Upon the death of Jackson (October 15, 1916) the amount he had so borrowed from his wife became due, and from the date of his death there should be a computation of six per cent. interest on the entire amount.

As the agreement claimed to have been made by Jackson with Grandfather Yount to the effect that he would pay interest greater than that paid by the guardian, we find this to be wholly without consideration and made with a person not in interest and not available of as a right by these plaintiffs; so that we regard it as entirely outside of this case.

It is clear, of course, that if the debt here sued upon became due and payable at the death of Jackson, then we are not interested in the question as to whether or not the statute of limitations is applicable under the sections of the revised statutes heretofore quoted, for the reason that the limitation would not run except from the date when the debt became due. The answer, being simply a general denial, does not raise the question of the statute of limitations.

Our finding is for the plaintiff in the amount indicated in the foregoing opinion.

**DISCRETION AS TO STRIKING A SHAM PLEADING
FROM THE FILES.**

Common Pleas Court of Hamilton County.

DANIEL W. MCGRATH v. THE CHARLES MCCAUL COMPANY,
A CORPORATION.

Decided, May 8, 1919.

Pleading—An Answer and Cross-Petition Will Not be Stricken from the Files as a Sham—When a Material Allegation Contained Therein is Not Denied by Plaintiff.

In an action by a sub-contractor for recovery of an amount claimed to be due him for work and material entering into the construction awarded to the principal contractor, a motion does not lie to strike from the files the answer and cross-petition of the principal contractor on the ground that it was not filed in good faith and is a sham as shown by inconsistencies between the statements as to the amount remaining due as stated in the answer and in an affidavit subsequently filed with the owner giving the amounts due the several sub-contractors for material or labor furnished or to be furnished by them, where the principal contractor has alleged that the plaintiff sub-contractor did not complete his work and the amount named in the cross-petition was the expense incurred in completing what plaintiff had left undone.

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Webber, McCoy & Jones and Philip Roettinger, for the motion.

Pogue, Hoffheimer & Pogue, contra.

DIXON, J.

Heard on motion of the plaintiff to strike defendant's answer and cross-petition from the files for the reason that the same is a sham, is filed for delay, is not filed in good faith, and is an imposition upon the court and a fraud upon the plaintiff.

This action was brought by the plaintiff to recover from the defendant company, which has the general contract for the erection of the new Hamilton County Court House building, the sum of \$14,458.35, with interest from the 1st day of March, 1918, which plaintiff claims is the balance due him on a contract entered into with defendant, under which plaintiff was to furnish certain material and labor for the erection of said building. By the terms of the contract plaintiff was to be paid monthly in a sum equal to the value of the work erected in place in said building during the preceding calendar month, less ten per cent. of such payments, which was to be reserved by defendant until ninety days after the contract had been completed by plaintiff and the work and material approved and accepted. Plaintiff claims that he has fully performed his part of the contract, excepting as to a small item thereof from the performance of which he was relieved by defendant; that more than ninety days have elapsed since he completed his work, and that his work and the material furnished by him under said contract have been approved and accepted by the defendant.

In its answer the defendant company admits that it entered into a contract with the plaintiff and that plaintiff agreed, for a stipulated price, to furnish certain material and labor for the Court House building, but denies that plaintiff has completed his contract and specifies numerous instances in which it claims that plaintiff has defaulted. Defendant further alleges that it was obliged to take over the work of completing plaintiff's contract upon his refusal to complete same, and that said contract has not been completed, nor has plaintiff's work or material been

approved and accepted. Defendant further claims that plaintiff has been paid all he is entitled to receive under his contract, and that it is withholding the stipulated retained percentage provided by the contract, which sum it proposes to charge with the cost of completing plaintiff's work and with any damages it may incur through plaintiff's alleged default.

By way of counter-claim the defendant company seeks to recover from plaintiff the sum of \$4,907.33, with interest, which it claims by reason of expenses incurred in proceeding with the completion of plaintiff's contract and damages sustained through his default.

The petition was filed on June 14, 1918; the answer and counter-claim on October 17, 1918; and the motion to strike on March 18, 1919.

For evidence in support of their motion, counsel for plaintiff rely chiefly upon a certain affidavit which was prepared by the defendant company and filed with the Court House Commissioners some time in January, 1919.

Schedule "A" attached to this affidavit purports to set forth a complete list of all sub-contractors and firms that have furnished labor and material for the construction of the Hamilton County Court House to whom balances are due and shows the amounts due each of said sub-contractors for all work and material furnished for said building up to and including the month of November, 1918, but does not include the retained percentage. Under this schedule it appears that there is due plaintiff the sum of \$1,019.60. It is in evidence that no work or material was furnished by plaintiff on or for said building between the months of October, 1918, and January, 1919.

Schedule "B" of said affidavit contains a complete list of all sub-contractors who have furnished labor and material, or who will furnish labor and material, toward the completion of said Court House and the amounts that will be due each of said sub-contractors at and upon the completion of said building, which amounts include the retained percentage. In this schedule the sum of \$14,221.91 appears after the name of the plaintiff.

Schedule "C" of said affidavit is a full list of said sub-contractors and the amounts due them at said completion for the

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retained percentage due them. In this schedule the sum of \$9,424.03 appears after the name of plaintiff.

Plaintiff claims that the filing of this affidavit by the defendant company several months after defendant filed its answer and counter-claim in this action is, in effect, a virtual admission under oath of the claim made in plaintiff's petition and a complete nullification of defendant's defenses and counter-claim.

Is this contention correct?

From the synopsis of the petition set forth above it appears that payment, under the contract between plaintiff and defendant, was conditioned upon the completion by plaintiff of his contract and the approval and acceptance of his work, all of which he claims was done. Defendant, however, denies that plaintiff has completed his work, and as a natural consequence denies that his work has been approved and accepted.

While it is true that there may be some inconsistency between the recitals in the affidavit referred to above and the claims made by the defendant company in this action, I am unable to find any recital in the affidavit which in any degree tends to repudiate defendant's claim that plaintiff has not completed his contract and that his work has not been approved and accepted. Nowhere in the affidavit does such an admission appear, nor is there anything in the affidavit which can be construed as a confession or admission on the part of the defendant company that it is indebted to the plaintiff in the amount claimed in the petition or in any other approximate amount. All that can be claimed from the affidavit, in my judgment, is, that the recitals with respect to Schedule "B," upon which plaintiff apparently relies, indicate that upon the completion of the building there will be due plaintiff the sum specified in that schedule, with the provision, of course, which does not appear in the affidavit, that the plaintiff carries out and performs his contract, without which the building could not be completed. In other words, it would appear from the affidavit that plaintiff's right to be paid the sum specified in Schedule "B" is predicated upon the completion of the building, and, whether rightfully or wrongfully, the court is constrained to take judicial notice of the fact that the new Court House is not yet completed.

In *White v. Calhoun et al*, 83 Ohio St., 401, where the right of the trial court to entertain, hear and determine a motion to strike off an answer believed to be a sham answer is specifically recognized, the opinion closes with the following admonition on page 407:

“It may be proper to add, in order to prevent misunderstanding, that the discretion of the court in such case should be exercised wisely and with discrimination, and such motion sustained only upon such showing upon the part of the plaintiff as leaves no question whatever of the truth and conclusiveness of the plaintiff's evidence. A situation in which there is a conflict of evidence upon any material point, or admitting of a rational doubt as to the proper order to be made, should result in the overruling of the motion.”

In the face of this language, and in view of the allegations of the answer and cross-petition and the recitals of the affidavit, I am not at all convinced that the evidence adduced by plaintiff warrants the exercise of any drastic power by the court, and the motion is therefore overruled.

VERIFICATION OF PETITION.

Common Pleas Court of Montgomery County.

RAY MENKE BY HENRY MENKE, HIS NEXT FRIEND, v. THE KINSEY
MOTOR CAR COMPANY.

Decided, May 1, 1919.

*Verification—Statutory Provisions as to Verification by Party—Not
Applicable to Infant.*

The provisions of Section 11351, permitting the verification of a pleading by a party, is without application to an infant in an action brought by his next friend, and a motion lies to strike from the files a pleading verified by an infant.

SNEDIKER, J.

This case is before the court on a motion to strike the petition from the files for the reason that the same is not properly verified.

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Upon examination of the petition we discover that the verification was made and signed by Ray Menke, the plaintiff who brings the suit, by Henry Menke, his next friend. A consideration of the motion involves the capacity of the next friend as such in bringing an action for an infant. The relation of a *prochein ame*, or next friend, to the infant is similar to that of a guardian *ad litem* to his ward. "The recital of the name of the next friend in the petition, as the next friend of the infant plaintiff, does not make him any more a party to the suit than the recital of the name of a guardian *ad litem* as guardian for minor defendants in the pleadings or its entry upon the docket makes him a party to the suit. Both are mere agents appointed either theoretically or in fact to conduct the business of the suit for the real parties whom they represent. The infant is the real party whose rights are bound by the judgment."

By the provision of the Code found at Section 11247 the action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court may dismiss it, if it is not for the benefit of the infant, or substitute the guardian or any person as the next friend. This provision shows the control of the court over the action not only with reference to the propriety of its being brought, but with reference to the suitability of the very person who brings the action as such next friend.

Section 11351 of the General Code recites:

"Every pleading and motion must be subscribed by the party or his attorney, and every pleading of fact except as provided in the next following section must be verified by the affidavit of the party, his agent or attorney * * *."

Section 11351 of the General Code reads in part:

"The affidavit verifying a pleading can be made by the agent or attorney only, * * * subdivision 2, when the plaintiff is an infant or of unsound mind or imprisoned * * *."

"An infant is entitled to sue on any cause of action accruing to him, and, conversely, may be sued on any cause of action accruing against him, but he is not considered as having sufficient discretion to conduct the suit in person, and, therefore, the law

provides a competent representative to conduct the suit for him. It is a general rule that actions by infants must be prosecuted in the name of the infant by his guardian or by a third person who is styled the next friend, or *prochein ame*, and an action against an infant must be brought against him in his proper person, but must be defended by a guardian *ad litem*, though this rule is not without exception." 10 Cyc. of Pleading and Practice, page 594.

The verification of the pleading is one of the essential and important acts in the conduct of a suit. The next friend, if he appears as he does here, to bring the action on behalf of his infant, ought to be required to do whatever may be necessary in its prosecution. The infant, while always the party plaintiff, is acting, as we have already indicated, through the next friend as his agent, and that agent is the only one recognized by the law of Ohio as qualified to perform the several acts necessary. It was with that in mind that the Legislature enacted Section 11358, which has been already referred to, and provided in Section 11351 that every pleading must be verified by the affidavit of the party, his agent or attorney.

We do not regard that part of Section 11351, which requires and permits verification by a party, as applying to the infant plaintiff in an action where suit is brought by his next friend. It will readily be seen by counsel that, if any other view was taken, a situation might arise in which an infant not capable of understanding the nature of an oath would undertake the verification of a pleading. With respect to his ability to verify, we are of the opinion that the general rule should be made that he may not do so, and that that act must be left to the person who in fact represents him in the beginning and throughout the action.

The motion is sustained.

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Hewett v. Dry Cleaning Co.

SATISFACTION OF JUDGMENT AGAINST A CONSTITUENT COMPANY.

Common Pleas Court of Hamilton County.

ALICE JEWETT V. THE FENTON DRY CLEANING & DYEING COMPANY, A CORPORATION.

Decided, April 9, 1919.

Aid of Execution—Stock in Payment of Constituent Company But Issued to Individuals—Held Subject Against Said Constituent Company—Liability of an Indemnity Company and the United Company upon the Same Claim.

1. The defendant and a number of other corporations engaged in the same business merged their interests and organized the United Company, under an agreement, whereby the latter was to pay for the assets of the constituent companies by issuing its stock in certain agreed amounts to them. The plaintiff at the time of such merger had an unliquidated claim for damages for personal injuries against the defendant. The United Company in supposed fulfillment of said contract issued its stock in the ascertained amount to F. and C., who were owners of all but a few shares of the defendant company, but issued no stock to the defendant company. Thereafter plaintiff secured judgment against the defendant to this court for execution. Execution was issued and returned "No goods." Upon proceedings in aid of execution to subject to the payment of the judgment, the stock in the United Company so issued to F. and C.; and also to subject the property of the United Company to the extent of the stock it should have issued to the defendant company,

Held: (a) The stock issued by the United Company to F. and C. in payment for the assets of the defendant company was held by F. and C. subject to the judgment of the plaintiff. *Pfister v. Traction Co.*, 89 Ohio St., 172, distinguished.

- (b) The contract to issue stock to the defendant company was not carried out by the United Company, and to that extent the property of the United Company was also subject to the payment of the plaintiff's judgment.

2. Where an indemnity company issues a policy to another company indemnifying it against liability for personal injuries, and the contract provides that the indemnity company shall have exclusive charge of the defense of any action for such damages, and shall be liable only for loss actually sustained by the insured after payment of judgment; and where such indemnity company assumes the defense in such action to the exclusion of the insured, and after execution is issued and returned "No goods," such company appears in court upon proceedings in aid of execution and resists such proceedings and the payment of the judgment, it makes itself liable to payment of the judgment, before the actual payment thereof by the insured.

DARBY, J.

The court of appeals of this county, on February 5, 1919, affirmed the judgment of this court for \$3,500 in favor of the plaintiff, and on the same day remanded this cause to this court for execution of said judgment. Thereafter execution was issued on said judgment, which was returned February 18, 1919, "No goods." On the last named date, the plaintiff filed her affidavit setting out the facts above stated and further that "the defendant has property and money which ought to be applied to the payment of said judgment, but which the defendant unjustly refuses to apply thereto; that the Fenton United Cleaning & Dyeing Company, the Globe Indemnity Company, a corporation transacting business in Ohio, Thomas L. Morgan and Thomas T. Fenton are indebted to the defendant company or have moneys or other property in their hands and possession belonging to said defendant company."

An order was thereupon made requiring the persons named in said affidavit to appear in this court on the 25th day of February, 1919, and answer concerning defendant's property.

The hearing upon the said affidavit and order was had on February 26, 1919, but not being finished on said day was postponed, and on February 28, 1919, the plaintiff filed her supplemental affidavit setting forth that the defendant company had property which ought to be applied to the payment of said judg-

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ment and "that Thomas T. Fenton, H. Bascom Fenton and Dudley O. Cross have various shares of preferred and common stock issued to them by the Fenton United Cleaning & Dyeing Company, the property of the defendant company, without consideration paid therefore; and the Fidelity & Deposit Company of Maryland, a corporation transacting business in Ohio, have moneys, credits and other property and are indebted to the defendant company," and an additional order was entered including the persons named in the supplemental affidavit.

Upon the conclusion of the hearing, which lasted several days, a motion was made by the plaintiff for an order subjecting the stock issued to Thomas T. Fenton, H. Bascom Fenton and Dudley O. Cross, to the satisfaction of the judgment in this case; also for an order against the Fenton United Cleaning & Dyeing Company to answer for the assets of the Fenton Dry Cleaning & Dyeing Company; also for an order upon the Fidelity & Deposit Company of Maryland to answer under its \$5,000 policy for the amount of the judgment and costs herein; also for the appointment of a receiver to take charge of such assets and subject them to the payment of this judgment.

The facts of the case are that in December, 1915, the plaintiff was injured by reason of the negligent operation of an automobile belonging to the defendant company; that the defendant company was immediately informed of said accident and very shortly thereafter negotiations for a settlement opened between the counsel for the plaintiff and the defendant company.

The defendant company held a policy covering the automobile in question in the Fidelity & Deposit Company. That policy was in the usual form of such policies and contained an agreement by the deposit company to indemnify the defendant company—

"against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered, as the result of an accident occurring while this policy is in force, by any person or persons * * *."

An further :

"To defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim covered by the policy, whether groundless or not, for damages on account of bodily injuries * * *."

"To pay all expenses, irrespective of the limits expressed in statement numbered 4 of the schedule of statements, incurred by the company in defending any suit, including any costs taxed against the assured and the interest accruing on that part of the verdict or judgment not in excess of the policy limits."

This agreement was subject to conditions; the only ones of importance in this case are as follows:

"A. Upon the occurrence of an accident the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company at its home office in Baltimore, Maryland, or its authorized representative. If a claim is made on account of such an accident the assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the assured to enforce such a claim, the assured shall immediately forward to the company at its home office every summons or other process as soon as the same shall have been served on him. The company reserves the right to settle any claim or suit. Whenever requested by the company, the assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The assured shall at all times render to the company all co-operation and assistance within his power."

"D. The assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor accept (except) at his own cost, settle any claim, nor without consent of the company previously given, incur any expense; except that he may provide at the time of the accident, at the cost of the company, such immediate surgical relief as is imperative."

"H. No action shall be brought against the company under or by reason of this policy, unless it shall be brought by the assured for a loss, defined hereunder, after final judgment has been

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rendered in a suit, described hereunder, and within two years from the date of such judgment, to-wit: for a loss that the assured has actually sustained by the assured's payment in money— (a) of a final judgment rendered after a trial in a suit against the assured for damages on account of the negligence of the assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the assured in the defense of a suit against the assured for damages on account of the negligence or alleged negligence of the assured. The company does not prejudice by this conditions any defenses against such action that it may be entitled to make under this policy."

The defendant company, upon receipt of notice of the accident, complied with the conditions of the policy by informing the deposit company of the same, and subsequently, when suit was brought, the deposit company took full charge of the defense of the cause, appeared in court upon all the proceedings, defended the action in court, prosecuted the proceedings in error, all of which appear from the record of the case.

In these proceedings in aid of execution, as originally instituted, the deposit company was not named, but another company, the Globe Indemnity Company was named.

The attorney representing the deposit company, insurer, appeared in this court and had charge of the interests of the defendant company. He was not employed by defendant company to appear at any time in the case, and subsequently, when on the supplemental affidavit the deposit company was brought into the proceedings, the same counsel appeared, not only on behalf of the deposit company, but also on behalf of the defendant company, and while it appeared that the defendant company had its own counsel, who was in court during these proceedings, the representative of the deposit company practically had complete charge of the interests of the defendant company.

For sometime immediately preceding the accident referred to, in December, 1915, negotiations were had between the defendant company and a number of other companies engaged in similar

and allied businesses looking to a merger or consolidation of all of these companies into one. These negotiations resulted in an agreement between the defendant company and a number of other companies on the one hand, and Thomas L. F. Morgan on the other, whereby, in consideration of one dollar, each of the said companies agreed to transfer, assign and deliver to Morgan all of its and their business, assets, good will, choses in action, and all other properties and rights "all for the purpose of retransferring, making over and assigning the same into a corporation to be incorporated under and by virtue of the laws of the state of Ohio, as provided for hereinafter." In said agreement it is further provided that said properties should be appraised and the appraised values "shall be taken as the values and basis for the apportionment and distribution of the capital stock in the said new corporation to and among the parties of the first part, in payment to them as the full consideration for their business, good will, assets, rights and properties of every kind and description, and for their transferring the same unto said new corporation through said party of the second part as aforesaid." It was understood and agreed "that each of the parties of the first part hereto, or their lawful successors or assigns, shall receive as and for full payment for its or their entire business, * * * as and for full consideration to each of said parties of the first part therefor, preferred and common stock in said new corporation * * *."

Under date of March 29, 1916, or thereabout, a general bill of sale of all the property of the defendant company was made to said Morgan; proceedings were had between the date of the first contract with Morgan and March 29, 1916, for the creation of the Fenton United Cleaning & Dyeing Company, which we will hereinafter call the United Company.

No stock of the United Company was ever issued to the defendant Company, as provided in said contract, but in a supposed fulfillment of the contract, on March 29, 1916, the defendant company signed a receipt for the shares of stock to be issued to it,

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but the certificates were in fact issued to Thomas T. Fenton, H. Bascom Fenton and D. O. Cross. At the time of the appraisal of the property of the defendant company, for the purposes of this reorganization, the total net assets of said company were found to be \$98,000. The stock of the defendant company was owned by Thomas T. Fenton, H. Bascom Fenton and D. O. Cross, excepting a few shares held by others. When the stock of the United Company was issued, apparently to pay for the assets of the defendant company, it was issued to Thomas T. Fenton, H. Bascom Fenton and D. O. Cross, in whose names the said certificates of stock still remain.

The defendant company is still in existence; its capital stock has been decreased to a nominal amount.

Upon this statement of facts, the plaintiff claims:

1. That the stock of Thomas T. Fenton, H. Bascom Fenton and D. O. Cross, in the United Company, should be applied to the payment of plaintiff's judgment;
2. That the property of the United Company, to the extent that it received assets of the defendant company, should be similarly applied:
3. That the \$5,000 policy (or its proceeds) of the deposit company should be applied in payment of the judgment.

These proceedings are equitable in their nature and designed to reach the property of the defendant company, if any there be, in the hands of the persons named in the affidavits and which can not be reached by the ordinary processes of the law.

The situation briefly is this: The plaintiff was injured by the employee of the defendant company, whose assets at that time were approximately \$100,000; since the injury the defendant company, with other similar companies, has disposed of its assets for the purpose of organizing the United Company. There has been an attempted payment for the assets of the defendant company by the issuance of the stock of the United Company

to the Fentons and Cross, who owned practically all of the stock of the defendant company. This stock of the United Company is the only payment made for the assets of the defendant company. No stock has been issued by the United Company to the Fenton company, in accordance with the terms of the contract of January 6, 1916. The stock so issued by the United company to the Fentons and Cross is still held by them.

What rights, if any, has the plaintiff in this case to the application of this last named stock to the payment of this judgment?

In the case of *Taylor v. Miami Exporting Company* and others 5 Ohio, 162, 165, in the opinion of the court by Judge Wright, concerning the liability of stockholders, we find the following:

“Judge Story, in the case of *Wood et al v. Deeman et al*, 3 Masson, 310, in discussing this subject says: ‘It appears to me very clear, upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the Legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibilities and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter; that is, as a fund for the payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain, upon principles of law, as well as common sense, that I can not be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill

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holders and other creditors have the first claim upon it; and the stockholders have no rights until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and can not take any portion of its funds until all the other claims upon it are extinguished. Their rights are not to the capital stock, but to the residuum after all the demands upon it are paid. On the dissolution of the corporation, the bill holders and stockholders have each equitable claims; but those of the bill holders possess, as I conceive, a prior exclusive equity. The same doctrine has been recognized by the Supreme Court of Massachusetts. 15 Mass. 505, 517, 522; 16 Mass. 9, 15. If I am right in this, the principal difficulty in this cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any person having knowledge of the trust attaching to it. As to the stockholders themselves, there can be no pretense to say that, both in law and fact, they are not affected with ample notice.' "

In Vol. 2 Morawetz on Private Corporations (Second Edition), Section 954, under the sub-heading: "Effect of Consolidation upon Rights of Creditors," we find the following very pertinent statement of the law:

"Parties can not transfer their debts and liabilities to others, and thereby discharge themselves. Any state law purporting to authorize such a transaction would be unconstitutional, because impairing the obligation of contracts.

"It seems clear, therefore, that a corporation can not discharge its liabilities by transferring them to another company; and the creditors of a corporation can not be compelled by law to accept the liability of a new company, formed by the stockholders of several companies, in substitution of their original rights. "However, it does not follow from this, that corporations can not be consolidated without the consent of their creditors. A trading corporation, like a copartnership, may be dissolved by its members whenever they desire. The dissolution of a corporation, by surrender of its charter, does not destroy the claim of its creditors. Their remedy *at law* is, indeed, lost in such case, unless otherwise provided by statute; but the assets of the cor-

poration remain a trust fund for the payment of its debts. A consolidation involves the dissolution of the consolidating companies, and the formation of a new and enlarged corporation out of the stockholders of the old companies with their combined capital. Neither of these transactions can be prevented by creditors, inasmuch as their rights are not thereby invaded. The legal liability of the consolidated company would be substituted in place of the legal liability of each of the original companies to its creditors; and the creditors of each of the companies would retain their equitable right to the security furnished by the assets of the company with which they dealt. Liens upon the property of a corporation clearly remain binding after its consolidation with another company."

The case of *Pfisterer v. Traction Company*, 89 Ohio St., 172, has no application to this branch of this case as that was a proceeding against the new corporation for a liability of the old corporation, and the stockholders liabilities were not considered in that case.

In *Hageman v. Southern Electric Railroad Co. et al*, 202 Mo., 249, the facts were similar to those in the *Pfisterer* case, and while the court held that the new company was not liable for the debts of the old one, it used this very pertinent language on page 259 of the opinion:

" * * * her (plaintiff's) contention is, the obligations of the Southern company should follow its assets as trust funds into the hands of the united company. In order to support that contention she invokes the well-known principle of equity, that 'it is a favorite doctrine with the courts of equity that the capital stock and other property of a corporation is to be deemed, as between creditor and stockholders, a trust fund for the payment of the debts; and when such property has been divided among the stockholders, leaving debts unpaid, the stockholders are in equity bound to refund.' (*Missouri Lead M. & S. Co. v. Reinhard*, 114 Mo. 1, c. 232; *Heman v. Britton*, 88 Mo., 549.)

"This rule has no application to the facts of this case. It applies to that class of cases where a corporation sells or disposes of all its property and divides the proceeds thereof among its stock-

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holders, without making provision for the payment of its outstanding obligations which existed at the time of the sale or the disposition of its property.

"The united company, the defendant in the case at bar, has not sold or disposed of its property, or distributed the proceeds thereof to its stockholders, but, upon the other hand, the fact is, it purchased the franchises, capital stock, money, choses in action, and all the other real, personal and mixed property of the Southern company in good faith and paid a sound price therefor, namely, one hundred and forty dollars a share. It does not stand in the same relation to the creditors of the Southern company that the stockholders of the latter company do. It has no property or money in its possession which it has not paid full value for; while, upon the other hand, those stockholders have in their hands the \$2,000,000, the sum the United Company paid them for the franchises, stock and properties of the Southern Company. That money is a trust fund for the payment of the debts and obligations of the Southern company."

The case of *Railway Company v. Griest*, 85 Ky., 619, is similar in its facts to the cases above mentioned. The syllabus in that case is as follows:

"1. Where one corporation sells to another all its property, franchises, etc., under authority conferred by its charter, the *bona fide* purchaser for value takes the property free from the claims of creditors of the vendor who have no lien upon the property, just as if it were an individual transaction.

"3. Rights of Creditors of Dissolved Corporation.—When a corporation has sold all its property, franchises, etc., and thus in effect been dissolved, the creditors of the corporation may enforce their demands in a court of equity, the proceeds of the property being regarded as assets in the hands of the stockholders for the payment of debts."

The Griest case was one in which injury had been suffered by the plaintiff by the negligence of the Paducah & Elizabethtown Railroad Company. Before he reduced his claim to judgment, a consolidation was made between that company and the defend-

ant company and full value paid for the assets in money and bonds, and the holding was as above stated. See also *Bank et al v. Manufacturing Co.*, 67 O. S., 306.

These authorities are so clear as to the obligation of the Fentons and Cross (as the principal stockholders of the defendant company and the ones who are now holding the consideration paid by the United Company for the assets of the defendant company), to satisfy any claims against the defendant company at the time of the consolidation, not a lien, nor assumed by the United Company, that as to them and the stock now held by them in the United Company, the motion of the plaintiff will be granted.

The second ground of plaintiff's motion is for an order against the Fenton United Cleaning & Dyeing Company, to answer for the assets of the Fenton Dry Cleaning & Dyeing Company, defendant.

As heretofore stated, the contract between the various companies uniting to form the United Company and Mr. Morgan provided that the payment for the assets of the various companies should be made by the issuance to each of the corporations of stock of the United Company.

It is in evidence that no stock was issued by the United Company to the defendant company, but that certain stock, equaling in amount that which should have been issued to the defendant company, was, in fact, issued to the Fentons and Cross, and it is the latter stock which is involved in the former consideration of the court.

It is a familiar principle—

“That a corporation is a legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for convenience in the transaction of its business, and of those who do business with it; but like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded.” *State ex rel. v. Standard Oil Co.*, 49 Ohio St., 137.

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It is true that the Fentons and Cross were entitled to the residuum of the assets of the defendant company after the creditors had been satisfied; but until that had occurred they were not entitled to such residuum.

The purpose and duty of the court in this case is to execute its own judgment affirmed by the Court of Appeals, and it will apply any property brought within its reach for that purpose. The courts are not created merely to give judgments and to sit idly by while an attempt is being made, by those responsible to pay the judgment and who have the assets of the person or corporation owing the same, to avoid the payment.

As the contract has not been fulfilled according to its terms and meaning, the motion of the plaintiff for an order against the United Company will be granted.

As stated above, the Fidelity & Deposit Company not only appeared in court to defend the defendant company, as it agreed to do under its contract, but, after defense was at an end and the case was returned to this court for execution of the judgment, the Deposit Company, through its agent and attorney, came into this court, without employment by the defendant company, and resisted and is still resisting these equitable proceedings in aid of execution.

In any event, the plaintiff is entitled to collect her judgment out of the proceeds of the assets of the defendant company, whether these proceeds are now in the hands of the United Company or the Fentons and Cross. But the Fentons and Cross and the Deposit Company are in court in a combination and plan to attempt to defeat the satisfaction of this judgment.

Many cases were referred to in argument and on brief holding that a contract similar to the one in this case is not for the benefit of one injured, but is solely for the benefit of the insured, and that in no event is the insurer liable to the insured until he has suffered a loss by actual payment in some form to the injured party, and many cases have been cited which hold that in no event is the insurer liable to the injured party.

It is true that in numbers these decisions exceed those in which a contrary view has been taken.

Without undertaking to refer to the various decisions in detail, the court will satisfy itself by reference to the case of *Fidelity & Casualty Company v. Martin*, 163 Ky., 12, which holds that the contract, being one of indemnity, there is no right of recovery except upon actual loss paid by the insured, and that the defense by the insurer, of the action on behalf of the insured does not change the legal obligation of the insurer. Most of the leading cases in support of the Kentucky case are referred to in the opinion of the court in that case and no further reference need be made to them here. However, that case would be of greater force and more convincing but for the view expressed by the court on page 29:

“ * * * that the purpose of the insurance company in framing its contract, as was done in that case (*Sanders v. Frankfort Ins. Co.*, 72 N. H., 482) and the instant case, was not so much to require a solvent assured to first pay the judgment, as to prevent itself from being subrogated to a loss which an insolvent assured was relieved by his insolvency, from paying.”

If the insurance company, in framing its policies, had in mind the taking of the premiums from insolvent persons, and being relieved from payment because of the insolvency, the whole contract was a fraud and would be against public policy.

It should be further said that the decision of the court in the Kentucky case is dissented from by Judges Nunn and Hannah.

The contrary view has been taken by a number of courts, some of them overruling, others modifying, earlier cases, but there seems to be a growing tendency to hold the insurance company for the amount of the policy, though the loss has not actually been paid, where the company takes upon itself the entire responsibility of the defense and excludes the insured from any participation therein. These cases are: *Patterson v. Adan*, 119 Minn., 308; *Davies v. Maryland Casualty Co.*, 154 Pac. (Wash.)

1116; *Elliott v. Aetna Life Ins. Co.*, 161 N. W. (Neb.), 579; *Sanders v. Insurance Co.*, 72 N. H., 485.

In the examination of the authorities no case has been found in which the insurance company has gone to the extent that the deposit company in this case to defeat the plaintiff and obstruct the execution of the judgment of this court, and if there is any force or effect in the reasoning of the cases last referred to it should apply doubly to a situation such as we have here. In effect, the Deposit Company, after defending the defendant company and prosecuting its proceedings in error to the Court of Appeals, comes back into this court and seeks to avoid its liability under its policy by keeping those responsible under this judgment from paying the same.

The moment the defendant company or those having its assets pay this judgment, that moment, it is admitted by the Deposit Company, it would be liable under the contract, and it is seeking to avoid this responsibility by the methods above suggested.

This court has no disposition to undertake to make a contract for the parties, but it will undertake to enforce the contract, as it has been treated by the parties, in which the deposit company has assumed the responsibility of seeking to avoid the satisfaction of the judgment after full defense has been made, which, in any view of the case, was all that was contemplated by its contract.

If it is the law of this state that an insurer can conduct itself as has been done in this case and escape from the effect of its own action in resisting payment of the judgment, some other court will have to decide it.

While it is not a case which bears directly upon the case at bar, *Boehnke v. Traction Company*, 88 Ohio St., 156, is an illuminating case upon the proposition that where one goes into court and assumes the defense of a case of another party, he may be held to answer for the judgment of the court.

It follows that the motion of the plaintiff for an order upon the Fidelity & Deposit Company of Maryland to answer under its policy will be granted.

Plaintiff may draw an order in conformity with the foregoing ruling, and, acting under the authority of the statute, the court will appoint William A. Geoghegan, receiver, to take charge of such assets and subject them to payment of the judgment, and an order will be made restraining Fenton and Cross, from transferring, assigning or in any way disposing of the certificates for the shares of stock now standing in their names and issued by the Fenton United Cleaning & Dyeing Company, and also from collecting any dividends upon said stock. An order may be taken against the Fenton United Cleaning & Dyeing Company, restraining it from transferring any of the said stock so held by Fenton and Cross, and from paying any dividends on such stock to them or either of them, and from in anywise disposing of the assets of the defendant, the Fenton Dry Cleaning & Dyeing Company.

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**INVALIDITY OF ORDER BY DIRECTOR GENERAL OF
RAILWAYS.**

Common Pleas Court of Hancock County.

J. R. EYESTONE v. CLEVELAND, C., C. & ST. L. RY. ET AL.

Decided, January Term, 1919.

Railways—Order of Director General Limiting Venue—Conflicts with Jurisdiction of the State Courts as Fixed by the Ohio Code—And is also a Delegation of Legislative Power.

1. On April 9, 1918, the Director General of Railroads issued what is known as general order No. 18, based on certain facts therein stated and directing that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides or in the county or district where the cause of action arose." Assuming said order to be valid and that the reasons for its observance do not exist in the particular case, whether the carrier in its own interest may waive the protection thereof and enter its voluntary appearance in the action by filing an answer taking issue with the petition—Quaere?
2. The said general order No. 18 is invalid as applied to state courts for two reasons: first, its effect would be to suspend the operation of Section 11273, General Code of Ohio, fixing the territorial jurisdiction of the courts of common pleas of the state; and second, the act of Congress, approved March 21, 1918, under the authority of which the order was made, would be a delegation of legislative power.

A. G. Fuller, for plaintiff.

Wilson & Rector and F. C. Amos and Burket & Burket, for defendant.

DUNCAN, J.

Heard on motion to dismiss for want of jurisdiction and demurrer to fourth defense.

This action was brought May 28, 1918, and is for tort upon which the cause of action arose May 17, 1917. The plaintiff resides in Wyandot county, and the cause of action arose there.

The defendants are common carriers of freight and passengers. On June 27, 1918, the defendants filed motion to dismiss the action upon the ground that the railroads of the defendants were under government control and that this is a personal injury case and therefore within the class defined by general order No. 18 of the Director General of Railroads, dated April 9, 1918, in which it is ordered that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides or in the county or district where the cause of action arose."

On July 11, 1918, the defendants filed a joint and several answer taking issue with the petition upon the merits and as a fourth separate defense sets up the said general order No. 18 as to the right of venue.

This motion should be overruled.

1. Whether the defendants have voluntarily submitted themselves to the jurisdiction by pleading to the merits—*quaere*.

2. The order of the Director General as to venue of actions is invalid so far as it relates to state courts.

The motion is in effect a plea to the jurisdiction. It is not made by the Director General of Railroads but by the defendants themselves and in their own interest.

The court could well take judicial notice that the facts which furnished the reason for the making of said order No. 18 were not true in this particular case; and not being true, and assuming the said order to be valid, the question arises whether the defendants had the power to waive the right as being in harmony with the purpose of the order and for their benefit to do so. It is claimed that they have waived their motion and entered their appearance by pleading to the merits, and the following cases are cited in support of this contention: *Harrington v. Heath*, 15 Ohio, 483; *Mahalm v. Marshall*, 29 Ohio St., 611; *O'Neal v. Blessing*, 34 Ohio St., 33; *Elliott v. Lawhead*, 43 Ohio St., 171; *Ohio Southern Ry. v. Morey*, 47 Ohio St., 207; *Long v. Newhouse*, 57 Ohio St., 348.

But if the effect of the order is to make the action local rather than transitory; or the question is one which must be made by

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answer rather than demurrer, the principle contended for would not apply. Having other reasons for overruling the motion, these questions are not passed upon.

The act of Congress approved August 29, 1916, by which the president was authorized to take possession of the railroads, Section 1648, Barnes' Federal Code, reads as follows:

"The president, in time of war, is empowered, through the secretary of war, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

On April 6, 1917, Congress declared a state of war between the United States and the Imperial German government, and on December 7, 1917, between the United States and the Imperial and Royal Austro-Hungarian government.

On December 26, 1917, the president issued a proclamation by which he took control of the railroads at 12 o'clock of December 28, 1917, through the secretary of war, and also directed that their control should be exercised by William H. McAdoo, whom he designated "Director General of Railroads."

The act of Congress approved March 21, 1918, relating to the liabilities and actions against carriers, Section 10163, Barnes' Federal Code, so far as it has reference to court actions, reads as follows:

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the president. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter in-

stituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, mesne or final shall be levied against any property under such federal control."

And the latter part of Section 10162 of the same act reads as follows:

"And the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this act shall also apply to any carriers to which federal control may be hereafter extended."

Afterwards, on April 9, 1918, the director general under authority of the part of said Section 10163 above quoted, and referring thereto, with the preamble giving the reasons therefor, made the said general order No. 18, as follows:

"Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week, or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiff.

"It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides or in the county or district where the cause of action arose."

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If this motion is granted, it is a holding to the effect that this order of the Director General takes precedence of all state laws on the subject, and in this particular case, suspends the operation of Section 11273, General Code of Ohio defining the territorial jurisdiction of the courts of common pleas of this state. And Section 11273 reads as follows:

“An action against * * * a railroad company owning or operating a railroad * * * within this state * * * may be brought in any county through or into which * * * such railroad * * * extends.”

The right to maintain an action in any particular court is subject to the legislative will. Congress has uniformly exercised this power as to the federal courts, but it is the province of the state legislatures to do this for their respective states. At no time has Congress ever attempted to perform this office for any state. This is the first time, to my knowledge, that the venue of court actions has ever been attempted by executive order. That the executive order was valid under this legislation as applied to the federal courts, has been decided several times, but each time the court was specific and disclaimed any intention of applying the principle to the state courts. *Wainwright v. Pennsylvania Ry.* 253 Fed., 459; *Cocker v. New York & O. Ry.*, 253 Fed., 676. *Contra. Friensen v. Chicago, Rhode Island & Pac. Ry.*, 254 Fed., 875.

The states were in existence before the adoption of the Constitution, and possessed and exercised nearly all the powers of sovereignty. The underlying principle of the Constitution is that the powers of the national government are enumerated therein and that those not there enumerated are reserved to the states. And lest there might be any possible question of this in the mind of those who might wield any portion of this authority, it was declared by the tenth article of the amendments, that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.” To ascertain, therefore, whether any power assumed by the government of the United States is

rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the power does not appear, the assumption must be held unwarranted. They are maintained by limiting the exercise of federal power to the sphere which the Constitution expressly or by fair implication assigns to it. Cooley's Principles of Constitutional Law, pp. 29-36.

The principle is illustrated in the following cases involving the validity of an act of Congress as applied to state courts requiring instruments to be stamped as a necessary prerequisite to their admission in evidence: *Craig v. Dimock*, 47 Ill., 308. From the opinion of Breese, C. J., at page 312:

"The object of this act and of all other acts of Congress of like nature, is to raise money to support the government, and pay its debts, and for this purpose vast powers were granted by the states in framing the Constitution of the United States, to the Congress established by it; but the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, were reserved to the states respectively, or to the people.

"While, then, the power to levy taxes for the purposes indicated in the Constitution may be admitted, it can not be admitted that it can be so exercised as to take from the domain of state legislation all such subjects as are properly confided to it, and the care of which has not been surrendered to the Congress by the states. Of this nature are the processes of the state courts in judicial proceedings."

Sporrer v. Eipler, 48 Tenn. (1 Heisk.), 633 (59 Pac., 179),
From the opinion of Turney, J.:

"The states are sovereign within their own limits, and foreign to each other, regarding them as local governments. *Bank of U. S. v. Daniel*, 37 U. S. (12 Pet.), 33 (9 L. Ed., 989). * * * There has been no delegation by states to Congress of power or authority to legislate for the internal regulation of the states, nor are the people of the states prohibited by the Constitution from creating and regulating the courts of the states and declaring the rules for their government. * * * If Congress may, by its enactments, make or change the rules of evidence as applicable to the courts of the states in any one particular, it may in all things. It may totally abolish existing rules of evi-

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dence and practice and substitute others new and wholly different."

To the same effect are: *Southern Ins. Co. v. Estes*, 106 Tenn., 472 (62 S. W., 149; 52 L. R. A., 915; 82 Am. St., 892; *Duffy v. Hobson*, 40 Cal., 240 (6 Am. Rep., 617; *Carpenter v. Snelling*, 97 Mass., 452; *State v. Glucose Sugar Co.*, 117 Ia., 524 (91 N. W., 794); *Hunter v. Cobb*, 64 Ky. (1 Buch), 239; *Knox v. Rossi*, 25 Nev., 96 (57 Pac., 179; 48 L. R. A., 305; 83 Am. St., 566); *Wallace v. Crovons*, 34 Ind., 534.

While Congress has power to declare war and to make all laws which may be necessary and proper for the execution of this power, Article I, Section 8, Constitution, there is certainly some limit to it, but assuming that it has the power to suspend the operation of state laws in the emergency, it has not done so in this respect, and it has not expressly delegated this power either to the President or the director general, and it has not impliedly, unless it is conferred upon the President by the provisions above quoted authorizing him to make orders for the exercise of government control. It would seem that in an act of Congress in which a step so far reaching is contemplated that the authority should be express. But whether implied or express, it would be a delegation of legislative power and hence within the restriction of the powers of Congress.

"Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted can not relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." Cooley, *Constitutional Limitations* (7 Ed.), p. 163, and cases there cited, among them, *Cincinnati, W. & Z. Ry. v. Clinton Co. (Comrs.)*, 1 Ohio St., 77.

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

This is from the opinion of Justice Harlan in *Field v. Clark*, 143 U. S., 649, where the act of Congress in question gave the President the right to suspend the operation of a law providing for the admission of foreign sugar duty free from any country which he found imposed exactions and duties on the agricultural and other products of the United States to be reciprocally unequal and unreasonable. And the justice goes on to say:

"Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides produced by or exported from such designated country while the suspension lasted. Nothing involving the expedience or the just operation of such legislation was left to the determination of the President."

This is the distinction running through all the cases, *United States v. Atchison, T. & Santa Fe Ry.*, 324 U. S., 476 (58 L. Ed., 1408, 1422; 34 Sup. Ct., 986); *Union Bridge Co. v. United States*, 204 U. S., 364 (51 L. Ed., 523; 27 Sup. Ct., 367); *St. Louis, I. M. & S. Ry. v. Taylor*, 210 U. S., 281 (52 L. Ed., 1061; 28 Sup. Ct., 616); *Monongahela Bridge Co. v. United States*, 216 U. S., 177 (54 L. Ed., 435; 30 Sup. Ct., 356); *United States v. Grimaud*, 220 U. S., 506 (55 L. Ed., 563; 31 Sup. Ct., 480).

But here the only legislation in this behalf was by way of reservation of rights to the public against carriers whether arising under state or federal laws or at common law, "except in so far as may be inconsistent with the provision of this act or any other act applicable to such federal control or with any other order of the President," with the added provision that "No process, mesne or final, shall be levied against any property under federal control." Section 10163, U. S. Rev. Stat. This is the grant of power upon which the said general order No. 18 is based. Unless this may be considered as a delegation of power to the President to make the order in question, the order of the director general was issued without authority. And if it is considered within this delegation of authority, it is void as within the restriction against the delegation of legislative power. It is certainly a legislative function to fix the jurisdiction of our courts, either judicial or territorial, and it is as much a

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legislative function to take it away, to change it or to suspend its operation as it is to confer it in the first instance.

Here, the act did not provide for the suspension of the operation of the territorial jurisdiction of the state courts dependent upon a state of facts to be determined by the President or other officials, as was done in the act in question in *Field v. Clark*, *supra*, the distinction which tests the validity of all such legislation. But the director general proceeds to make a finding of facts where the privileges of the citizen under said Section 11273, G. C., are "sometimes" taken advantage of to the detriment of the operation of a railroad, and then based upon that finding, makes a general order, not applicable alone to that situation, but "that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

The question is not as to what the statute of Ohio ought to be in such cases, nor what power the director general ought to have in such matters. It is, did he, as a matter of law, have the power to suspend the operation of the statute of Ohio fixing the territorial jurisdiction of the courts of common pleas of this state? This question is especially pertinent where, as here, the cause of action arose prior to the passage of the act of Congress under which the order was made. The court takes judicial notice that one of the facts upon which the order was made exist in this particular case, and that so far as the convenience of the trainmen is concerned, it will be as near the scene of the accident and as convenient for them to attend the trial in this county as in Wyandot. This situation, however, is foreclosed against the plaintiff by the absolute order of the director general.

For the reason then that there would be a conflict of jurisdiction between state and nation if this order was intended to extend to state courts, and that it must have a retroactive operation, if applied here, the right of Congress and the President under the law, should be more strictly construed; and being of the opinion also that the said act of Congress, if it extends

thus far, is an attempted delegation of legislative power, the exercise of which would have the effect to suspend the operation of a state law, and thereby to encroach upon the sphere of sovereignty residing in the state, forces the conclusion that the said general order No. 18 was not intended to operate against state laws, and that if it was, it is invalid.

Holding these views, the motion to dismiss the action will be overruled. Exceptions.

And for the same reasons the demurrer to the fourth defense of the answer will be sustained.

SLANDER WHEN UTTERED AGAINST A GROUP.

Court of Common Pleas of Hamilton County.

CHARLES STONE, A MINOR, ETC., v. EDWARD J. RUTHMAN.

Decided, June 5, 1919.

Slander—Where the Defamatory Words were Spoken to Persons Collectively—Single Member of the Group may Maintain an Action, When—Publication of the Defamatory Words—Abusive Language not Slanderous, When.

1. While the utterance of defamatory words against a number or class of persons does not afford a basis for an action for slander where brought by the group as a whole, any single member of the group may recover, if he can satisfy the jury that he was the one against whom the language complained of was aimed.
2. Whether publication can be claimed for defamatory language uttered of and concerning three persons and heard by none except the three, *Quære*.
3. The use by an employer when speaking to a group of three of his striking employees, where the only difference between the employer and the employees is the number of working hours, of the language, "You are nothing but a bunch of crooks and thieves," shows no intention to impute a crime against the men addressed and, therefore, does not afford a basis for an action for slander. The language was abusive but nothing more.

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Stone v. Ruthman.

John Thorndyke, for plaintiffs in error.

Dolle, Taylor, O'Donnell & Geisler, for defendant in error.

DARBY, J.

Error to the Municipal Court of Cincinnati.

The plaintiff in error brought suit in the municipal court against the defendant in error for an alleged slander, the language charged being, "You (meaning plaintiff and plaintiff's friends then with him) are nothing but a bunch (meaning plaintiff and plaintiff's friends then with him) of crooks and thieves."

At the conclusion of the plaintiff's evidence upon motion of the defendant the court rendered the following decision:

"The Court rules that these words were spoken collectively. The evidence shows that no one was present except these three men and the defendant, and under the rule of law, they must be uttered within the hearing of a third party or parties; the testimony shows that no one else was present; therefore the allegation of slander has not been sustained, and the Court grants the motion of defendant for an instructed verdict."

Such verdict was rendered by the jury, followed by a judgment in favor of the defendant; this proceeding seeks a reversal of such judgment.

Briefly, the facts are, that Stone, the plaintiff, and two companions, Hayes and Kruse, were employees of the Ruthman Machinery Company, with which the defendant was connected; that some ten days before the alleged slander said persons with others, went on a strike, ceased their work for the company, and during the strike and up to the day alleged, acted as pickets at the company's plant; that on the morning in question the three referred to, including the plaintiff, were so picketing one of the entrances to the plant when defendant came to the place of business, entered it and afterwards came to the front door, near which plaintiff and his associates were stationed; defendant ordering them off the sidewalk, to which Hayes replied that they did not have to go; thereupon, defendant told them that they would have to keep moving, to which Hayes replied that they were moving,

and Ruthman then said as charged in the petition, "You are nothing but a bunch of crooks and thieves."

The plaintiff did not appear at the trial; he was then in some branch of the United States service. The only witness to prove the direct statement by the defendant was Hayes, and he said on his cross-examination that during the time of the strike that he and others of the strikers talked with the defendant and that he inquired of them why they left the factory. Hayes spoke of having one fuss with the defendant; whether that referred to the morning of the slander or another occasion is not clear. Hayes further stated that the defendant was angry at the time, but that he, Hayes, and his companions were in good humor.

It is further in testimony that the defendant had no disagreement of any kind with the individual employees, but that there was a controversy between him and the Machinist's Union. There was no claim on the part of Hayes or any other witness for the plaintiff that they left the employ of the company because of any other disagreement or difficulty than the number of hours per week they should work. There was no suggestion in the testimony that anything had been stolen from the Ruthman Company. The record shows that Hayes knew of no theft and did not believe that any of the men included in defendant's statement were thieves or crooks.

On page 7 of the bill of exceptions, in the testimony of Hayes appears the following question and answer:

"Q. Do you know what either the union or you men had done to cause Ruthman to say that you were a bunch of thieves and crooks?"

"A. Only thing I could tell was because his father came around and tacked up a sign and said 52 hours shall constitute a week's work. We stayed there and worked a month and they would not come to any agreement and we went out."

The testimony of Hayes was that he, Stone and Kruse were the only persons who heard the statement of the defendant, charged as slander.

It was claimed in argument that inasmuch as the statement directed to the three men was "You are a bunch of crooks and

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thieves," that the plaintiff had no cause of action; in other words, that the statement was "You are a bunch," indicating the men collectively, and therefore that there was no individual slander of the plaintiff; that the statement was directed to the three men and was the equivalent of saying, "You are all crooks and thieves," and while the statement was directed to them collectively, the plaintiff has charged in his bill of particulars by proper innuendo, that he was accused of being a crook and thief.

In *Tedtmann v. Hancock*, 1 C. C., 238, it was held that,

"To say to, and of another in a public discourse spoken in the presence and hearing of others: 'You are a fraud. You do not pay your debts. You are a thief and a fraud,' is *prima facie* actionable slander."

The rule is well settled that where one utters words imputing crime, etc., to a class without singling out an individual, there can be no action by the individual, but, where slanderous words are spoken of a number of persons and the plaintiff alleges that he was included within the number and can by proper evidence satisfy the jury of that fact, he is entitled to recover.

Newell Slander and Libel, Section 488, states the rule thus:

"Where defamatory words reflect upon a class of persons impartially, and there is nothing to show which one is meant, no action lies at a suit of a member of the class. But any member of the class who can prove that the words were intended to apply to him can recover."

An early case upon this subject is *The King v. Alme and Nott*, 3 Salkeld, 244, where it is said:

"Where a writing which inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown—this is not libel, but it must descend to particulars and individuals to make it a libel."

In *Jones v. Hulton & Company*, 2 K. B. (1909), 444, in the discussion by Farwell, L. J., on page 481, is the following language:

"If the libel consisted in defamation of a number of individuals described generally, that is to say, 'as the owners of some of the

Irish factories,' as in *LeFanu v. Malcomson*, 1 H. L. C., 637, every member of the class who could satisfy the jury that he was a person aimed at and defamed could recover; and I can see no reason why two or more persons of the name of Artemus Jones who produced evidence from their acquaintances and others in different parts of the kingdom similar to that produced by the plaintiff in this case, the other circumstances being similar, should not recover."

In *LeFaun v. Malcomson*, *supra*, the court say:

"Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter."

In the case of *Byers v. Martin*, 2 Col., 605, the facts were that the plaintiff was a member of a jury in a criminal action, and after a verdict of not guilty, the defendant published in a newspaper the following:

"We are not a little surprised at Judge Wells' lenient charge in the case. We are still more so at the infamous verdict of this jury" * * * "we can not express the contempt which should be felt for these twelve men, who have thus not only offended public opinion, but have done injustice to their own oaths."

The plaintiff alleged that the language quoted was uttered concerning him. The court say:

"A publication which denounces a verdict as infamous, and declarations that, 'we can not express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths,' is directed against the jurors individually."

Sustaining the view that where language is uttered concerning a number or class of persons, that one of them is entitled to recover if he can show that he is included within the class or number, are the following cases: *Weston v. Commercial Advertising*

Assn., 184 N. Y., 479; *Ryckman v. Delavan*, 25 Wend., 186, 198; *Sumner v. Buel*, 12 Johns., 474; *Wofford v. Meeks et al*, 129 Ala., 349, 358; *Comes v. Cruce*, 85 Ark., 79, 83; *Marsden v. Henderson*, 22 U. C. Q. B., 585.

The defendant in error claimed in argument that there was no publication of the alleged slander, because it was spoken of the three men to them, and that no other person heard the language; in other words, that the persons slandered were the only hearers of the slander.

It is clear that publication is essential to an action for slander. In any case in which no one hears the words except the person of whom they are spoken, there is no action because no publication. No authority has been presented or found which covers a similar situation to this one.

It would seem that for one to say of several persons, "You are thieves," or to say in their presence other words imputing a crime might be damaging to one or more of them in the extreme, but under the circumstances of this case the court is bound to find that there was no slander for another and a different reason.

The law of this state follows the general rule that language to be actionable as imputing a crime must be such as that the hearers of the language understand that a crime is imputed.

In *Brown v. Myers*, 40 Ohio St., 99, the first syllabus is as follows:

"An action of slander can not be maintained for words which impute a crime, where, from all that was said at the time the words were spoken, it appears that the words had relation to a transaction that was not criminal, and that they must have been so understood by the hearers."

The language in the case last above referred to was, "Myers is a thief, and ought to be in the penitentiary long ago." These words were spoken in connection with an explanation about a transaction of Myers in connection with an assessment paid after a fire, and also with reference to some other transaction which the hearer knew and understood was not of a criminal character.

On page 101 of the opinion of the court, will be found the following.

“It is for the jury to determine what meaning the words were spoken and understood; but where the words with all that was said in the same conversation show no intention to impute a crime, but a total absence of such intention, the plaintiff’s case fails in its proof as a matter of law.”

As stated, the plaintiff and his companions were employees of the defendant. They had ceased their employment and gone upon strike, not because of any accusation of theft, but solely because they were objecting to the hours of employment, and Hayes in his testimony says that there was no complaint or trouble of any kind between the defendant and his company, and the plaintiff and his associates, except as it grew out of the strike, and that the defendant had inquired of them why they had ceased their employment.

The whole transaction was known to the plaintiff and his associates, and even though there were publication of the charge against the plaintiff in the presence of his two companions, as a matter of law, all that was said and done shows no intention to impute a crime, but a total absence of such intention. The language was abusive, used in anger, but nothing more was intended or understood.

It follows that the court below was correct in ordering a verdict for the defendant upon the plaintiff’s testimony.

The judgment will be affirmed.

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PROCEDURE FOR THE CONSOLIDATION OF CHURCHES.

. Common Pleas Court of Muskingum County.

THE FIRST UNITED PRESBYTERIAN CHURCH OF NEW CONCORD,
OHIO, v. J. A. YOUNG ET AL.

Decided, 1919.

Religious Societies—Attempt to Consolidate an Incorporated and an Unincorporated Church—Function of Boards of Trustees—Statutory Remedies which are Cumulative and not Exclusive—Dissenting Members may not Enjoin a Consolidation of Churches, When.

1. The corporate powers, business and property of an incorporated religious society are vested in, and must be exercised, conducted and controlled by, its board of trustees in accordance with the provisions of Section 8660 of the General Code of Ohio; and a suit in the name of the corporation can not be maintained in violation of such requirements.
2. Sections 10004-10009 General Code, inclusive, pertaining to the consolidation of religious and benevolent societies and the transfer of property are in the nature of cumulative remedies and not exclusive, and therefore do not exclude or interfere with the common law remedies.
3. Where two local church organizations, having the same religious faith and working under the same ecclesiastical jurisdiction, by a vote of more than two-thirds of the membership of each body determine to consolidate, and such action of the churches in the completion of the union has been in conformity to the rules of such common ecclesiastical body and approved and confirmed by it, a group of the dissenting members of one of the churches, without calling or attempting to call the trustees of their church together for the purpose of acting in the matter may not, in the name of their corporate body, enjoin and prohibit such consolidation under the claim that such act of consolidation interfered with and deprived plaintiff of its property without its consent and in violation of its constitutional rights.

H. C. Shepherd and C. F. Ribble, for plaintiff.

H. C. Pugh, E. F. O'Neal and C. Ellis Moore, contra.

WEBER, J.

The facts in this case, as they appear from the pleadings and the evidence, are in substance as follows:

The plaintiff is an incorporated religious association and owner of real estate (described in the petition) in New Concord and also pulpit furniture, communion sets, and other personal property. There is also in that village another religious organization, unincorporated, known as the Second United Presbyterian Church. Both churches are members, and under the ecclesiastical jurisdiction of, the United Presbyterian Church of North America.

Plaintiff claims a membership of about three hundred souls and the Second Church something over two hundred. How many of them are said to be in good standing does not appear. In the winter and spring of 1917 and 1918, a movement was started in both churches, looking to a union of the two congregations and the formation of one new church.

To this movement some opposition developed. Each of the congregations, after notice to its members, by more than two-thirds of its members and a majority of the membership in each church, voted for the union, and, later, plans for union were prepared by committees representing each church, agreed upon, and reported back to the congregations, confirmed by those bodies, favorably acted upon by the Session of each church, and brought before the Presbytery for its action.

The Presbytery appointed a commission to investigate the matter of the proposed union and, after hearing the claims of both sides, including protests filed by the minority representation from each church, at three different meetings, decided in favor of the union, and so reported to the Presbytery. The action of the Presbytery in uniting the two congregations was later affirmed by the higher reviewing body, the Synod.

In the meantime, a clash came between a few of the protesting members of the First Church and about a like number of the United Church, over the rights of the new congregations to

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hold services in the meeting house standing on the lot of the First Church.

Each side undertook to bar the other from entrance and this resulted in suit being brought by the First Church, or in the name of the First Church, to enjoin those who represented the new organization from entering the property on the First Church lot and appropriating it to the use of the consolidated churches. Further facts and the questions raised will appear in the opinion.

Two propositions are before the court for determination.

First: May this action, under the facts as they appear from the evidence, be maintained in the name of the plaintiff?

Second: Is there an interference by the new United Church with the property rights of the First Church resulting in the unlawful appropriation of the latter's property without its consent?

Looking, then, to the first proposition:

The issue raised by the first defense is that this action was brought in the name of the First United Presbyterian Church without authority from said organization or the trustees thereof, and that said church did not bring this action and is not the plaintiff.

In determining this question two statutes are necessarily involved and must be considered in connection with the evidence.

“Section 8654 (G. C.)—*Members of a Religious, Secret or Benevolent Society.* Where the incorporators of such a corporation now or hereafter formed, are or become members of a church, religious, secret or benevolent society, and have signed or sign articles to incorporate either thereof, any person who is or becomes a member of such church, religious, secret or benevolent society, in good standing. thereby shall be a member of such corporation, with the right to vote at all of its meetings for the election of officers or for any other purpose.”

Section 8660 provides:

“The corporate powers, business and property of corporations formed under this title shall be exercised, conducted and con-

trolled by the board of directors; or, if there is no capital stock, by the board of trustees."

It is not claimed by plaintiff that this action was brought by the trustees of the First U. P. Church. The evidence shows that some two or three meetings were called by a few of the protestants and that no regular notice of a meeting of the trustees was given. The testimony on this point is clear and uncontradictory. There were seven trustees of this church acting at the time the proposed union was commenced, to-wit, John L. Noble, Clark Best, Mr. McCutcheon, Robert Speer, Seth Campbell, Elliott Ralston, and James A. Young. The last three favored the union of the two churches. We will notice briefly the testimony of the two men who verified the petition, Mr. John L. Noble and S. I. Duff, who were trustee and elder, respectively, of the First Church.

Mr. Noble was called:

Q. Did any notice of the trustees meeting go out? Did you have any?

A. No, sir.

Q. It was, in fact, simply a little meeting of the individuals who were opposed to this church union, wasn't it, Mr. Noble?

A. Yes, the way it was carried out.

Q. And that was your sole authority for the bringing of this action, wasn't it, Mr. Noble?

A. That was — Yes, sir, it was.

Q. Did you ask any other trustee to join you in this lawsuit?

A. We just talked the matter over, as I stated a while ago—during meetings and as I stated here before, I was appointed one of the committee, not acting really as a trustee at all—as a committee.

Q. Did you ever ask him (Clark Best) to join you in this suit?

A. No, sir.

By the Court:

Q. When was your first meeting held with relation to this matter?

A. That was in April, I suppose, and we had two, may be three.

Q. That many meetings?

A. Yes. Now, they wasn't called meetings of the trustees; just a joint or a general meeting of us, you know, that call our-

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selves still the First U. P.'s. We gathered together and talked the matter over and of course we had our chairman and we had our secretary, and then when it come to appointing a committee—a motion to that effect that the chairman would name a committee of two.

Q. For what purpose?

A. To go and consult the lawyer and if he gave us good advice, recommended us to go ahead, to proceed, gave us the power to proceed; not as trustees but as a committee.

Q. How many of them (trustees) were present at that first meeting? You, yourself, were one?

A. Yes, and Robert Spere, and I think Clark Best. It was probably a week till we held another meeting.

Q. Was it a called meeting for the trustees?

A. No; just kind of a congregation of us, you know, members, what we considered our members took the same action in it as I did myself.

Q. Was there a memorandum made of the action of the trustees?

A. Of the trustees alone, no.

Q. Then none of the meetings prior to the time of the bringing of this action was called as trustees' meetings?

A. No; they were not called as trustees' meetings at all.

Q. Some three of the original trustees had become members of the United Church. They were not notified of the meeting?

A. No, sir.

Q. You treated them as no longer members of the First Presbyterian Church?

A. Yes, sir.

Q. When you brought this action, did you bring it as trustees of the First Church or simply as a committee authorized or as members of the organization?

A. Why, it would be a committee authorized by the members of the organization.

Q. And not by the trustees?

A. No; not by the trustees; just by the members that were present.

Q. Before that, you had no trustees' meetings nor organization of trustees?

A. No, sir.

Mr. Noble further testified that there were from 18 to 25 members present when this committee was appointed; that the

meetings were held at his mill; that a few were there, protestants from the other church, and at one of the meetings John McCall, a member of the Second Church, acted as chairman.

Mr. S. I. Duff testified that he signed the petition:

Q. You did not pretend to be acting for the trustees of the First United Presbyterian Church at the time you signed that, did you?

A. No, sir. I wasn't a trustee.

Mr. Ralston, Mr. Campbell and Mr. Young, trustees who favored the union, all testified that there was no trustee meeting and that they knew nothing of a meeting.

Now it is claimed by counsel for plaintiff that if the trustees did not authorize the bringing of this action, they afterward assented to and ratified it; but I have gone through this testimony and fail to find anything to warrant such a conclusion. Neither of the members of the committee, Mr. Noble and Mr. Duff, claims that they brought this action under authority of the trustees, but simply as representatives of a few dissenting members (18 to 25) who got together at Mr. Noble's mill and decided to take this action.

Surely, if Section 8660 means anything, this suit would have to be brought by the trustees of the First United Presbyterian Church. But it is claimed that the case of the *South Kenton Sunday School Association v. Espy et al*, 17 O. C. C., 524, authorized the bringing of this action in this form.

That case may be distinguished from this in this respect: In that case, five of the seven trustees had already executed a deed conveying the property of plaintiff to the M. E. Church. The court say (p. 530):

"Another point made by defendants is that the plaintiff was not authorized to bring this action and that no one has been authorized to sue for it. This claim grows out of the fact that five trustees refused to have the suit brought, and after it had been commenced, signed a document asking its dismissal."

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In the case at bar, two-thirds of the members of the First Church had voted in favor of the union, three of the seven trustees included. Four, or a majority of the members either remained inactive or were opposed to the union and nothing appears from the testimony but what they were in touch with the interests of the church.

Yet neither they nor the three who were favorable to the union were ever called upon by the protesting members to defend the interests of the First Church if they were being jeopardized, and, as appears from the testimony, no meeting of the trustees was ever called—no attempt whatever was made to have those officers of this incorporated body act, in whom “the corporate powers, business and property * * * shall be exercised, conducted and controlled.”

In the Espy case only two of the seven trustees remained. They had no quorum to enable them to transact business or fill vacancies in office. In the case at bar, a quorum could have been called, vacancies, if any had occurred, filled, and in either event this suit authorized, if favored. Nothing of the kind was attempted. It seems to the court that at least an effort should have been made to have the legally constituted body, the trustees, act in the matter. Upon their refusal, I have no doubt but that any member in good standing could have brought the suit—not in the name of the corporation, but in behalf of all who felt aggrieved, when the reasons for so bringing the action were made to appear by the allegations of the petition. *Munsel v. Boyd*, 10 C.C.(N.S.) 121. Again, in the Espy case, there was no authority to convey procured from members of corporation or from the court (1st Syl.),

Notwithstanding the above distinction between the Espy case and this, and with all due respect for the able court that decided the Espy case, and with a thorough understanding of the facts as therein stated, I am still at a loss to know how its position can be maintained, for as this court views it, it virtually overrides Section 8660 of the General Code. If two trustees could maintain this action in the name of the corporation, then,

by the same process of reasoning, one trustee could maintain it. To hold that one or two trustees or any number fewer than a majority can assume the duties and responsibilities of a corporate body and transact business for and in the name of the corporation, and taking refuge beneath the corporate name, engage in a lawsuit and thus compel it, without its consent, to submit to costly litigation, as in the case at bar, seems to this court to be beyond reason or authority.

"A meeting of the church members as such as not a meeting of the incorporated society, and it can not instruct the trustees in their duties, or assume any power over them." 24 Am. & Eng. Encyc. Law, 360 (2d Ed.)

So far as I am able to ascertain, the same principles apply alike to religious corporations and corporations for profit. The same section of the statutes that fixes the duties and obligations of the officers of the one imposes like duties and responsibilities on the other. And even a *majority* of such trustees may not bind the corporation acting separately, and not collectively, as a board. A well considered case on this subject may be found in 5 N. P. Rep., 378, where these principles are discussed and some of the authorities collated by Judge Dellenbaugh, of the Cuyahoga common pleas.

"A religious corporation can only be bound by its board of trustees acting as a body; and a contract made by the members of the board of trustees, constituting a majority of the board, but acting separately and not collectively as a board at a meeting regularly called, will not bind the corporation, but such members will be individually liable." *Lumber Co. v. Taylor St. M. E. Church*, 5 N. P., 378.

"The fact alleged in the answer, to-wit, that the plaintiffs were not trustees of the corporation, *goes directly to the plaintiffs' legal capacity to sue* in this case; the defendants had the right, as we think * * * to make this issue by answer," etc. *First Pres. Society v. Smithers*, 12 O. S., 248, 252.

"The same general rules apply to actions by religious societies, whether incorporated or not, as apply to civil corporations, or associations." 24 A. & E. Encyc. of Law, 371 (2d Ed.)

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In view of these authorities, supported by plain principles of reason and justice, this court must and does hold that this action can be maintained in the corporate name of the First United Presbyterian Church of New Concord, Ohio, by that body only whom the statute designates as the custodian of its powers, business and property, to-wit, its board of trustees.

While the view taken by this court of the right of these persons to maintain this action in the name of plaintiff is decisive, inasmuch as the evidence on the question as to the legality of the proceedings for the union of the two churches has been submitted, I will take up a consideration of that branch of the case, assuming that the First Church is in court.

The evidence discloses the following facts:

On April 1, 1854, a conveyance was made by Jas. Findley and wife, of the first part, to Henry J. Bonner, Andrew Walker and James D. Dunningham, of Muskingum county, and Francis Discon, of Guernsey county, constituted as a building committee, party of the second part, for the real estate in question, situate in New Concord, Muskingum county, Ohio.

The recitals in the deed are, "that the said first party, for and in consideration of the sum of two hundred dollars to them secured to be paid by the party of the second part, have given, granted, bargained and sold, and by these presents do give, grant, bargain, sell, release, convey and confirm unto the said party of the second part their successors or legal representatives therefor in trust for the congregation for the purposes of erecting thereon an Associate Reformed Meeting House" * * * "to have and to hold the same, as aforesaid, with all the privileges thereunto belonging, unto them, the said party of the second part, for the purpose as aforesaid."

No other or further conveyance has ever been made. From the testimony of Dr. John S. Speer, we learn that this congregation was organized about the year 1812 and church and cemetery founded at a point perhaps a half mile outside the corporate limits to the south of New Concord, known as Crooked Creek; that this congregation worshiped there until the year 1854, when the

above conveyance was made and the present church building was erected thereon. It was still known as the Associate Reformed Church and remained so until the year 1858, when a union was perfected between the Associate Reformed Church and the "Associated" churches, under the name of the United Presbyterian Church of North America; and this church was then called the First United Presbyterian Church of New Concord.

From the time of the union above mentioned until the present, this church became tributary to, part and parcel, and under the jurisdiction of, the United Presbyterian Church of North America.

On the 9th of July, 1896, articles of incorporation were issued by the Secretary of State in behalf of the First Church, to Alex McConaughy, Thomas J. Dickson, M. M. P. McCreary, M. E. Trace and C. P. Given. The third article provides:

"The purpose for which said corporation is formed is to organize and maintain an organization or association of persons for the purpose of worshipping God according to the tenets and belief of the U. P. Church of North America, and in accordance with the discipline of said church and to hold property for church purposes, and for all purposes for which similar bodies are organized."

The complaint made by plaintiff is that the defendants and all who are associated with the "United Presbyterian Church of New Concord (the new or united organization) deprive plaintiff of its access to and use of the church; that plaintiff is an incorporated body and as such holds the title and is entitled to the possession of that property without interruption or molestation on the part of anyone who is not a member of the incorporated body; that those who favor the union of these two churches are not members of it."

"That Section 10008, G. C., points the way and the only way in which unincorporated religious societies or ecclesiastical bodies may consolidate."

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On the other hand, defendants claim that this statute is not exclusive, but cumulative, in connection with common law rights.

One may see at a glance that the legislation on the subject of conveying or encumbering property belonging to such organizations and the consolidation of these bodies has been done piece-meal, covering quite a space of years.

A half dozen years before the above statute was enacted (1870), our General Assembly passed a law defining the method by which two or more religious societies, churches or associations *recognizing the same ecclesiastical jurisdiction, form of faith, government, order and discipline* may be consolidated and *a new corporation formed*. This statute is now Section 10004 of the General Code of Ohio.

Upon comparison of these two laws, one distinction is quite patent and that is, consolidation under General Code 10004 must be confined to those "religious societies, churches, or associations *recognizing the same ecclesiastical jurisdiction, form of faith, government, order and discipline* only. While consolidation under Section 10008 is much broader in its scope and, apparently, is intended to protect the new organization and every person interested in the property rights of both the separate and the united bodies. It applies as well to *incorporated* as to *unincorporated* bodies, and their religious beliefs, ecclesiastical jurisdictions, faith, form of government, and discipline may be entirely at variance with one another. Again, Section 10004 provides a way by which the consolidated body may become endowed with full corporate powers, without requiring it to take up the usual formalities incident to the incorporation of an original association. Nothing of this kind is provided for in Section 10008.

It (10008), does not take the initiative by providing *how* these bodies may unite; much less how organizations of the faith, form of government, and discipline and under the same ecclesiastical jurisdiction may be unified.

It simply says that courts will assume jurisdiction and order the conveyance of real estate when certain facts are made to appear as follows:

First, The union must have had the support of every member of the separate organizations.

Second, the proper officers of the new society may, at the request of the majority of the members of either of the societies, denominations, or corporations, petition the court of common pleas for an order to convey the real estate belonging to the separate organizations to the consolidated body.

Third, the order shall not be inconsistent with the original terms upon which the real estate became vested or intrusted to the parties to the union.

Fourth, the grantors of the real estate or their heirs shall be made parties.

Fifth, notice of the pendency of the petition shall be published for four consecutive weeks.

Thus, this statute opens the way for the consolidation of any and all kinds of separate religious bodies by fully protecting the rights of all who could possibly be interested.

Upon an examination of the legislation, we find that Section 10008 is the only one that has any application to the present case. It is absolutely silent as to the personal property belonging to the consolidated bodies. Was there, or is there, then, any common law remedy or proceeding?

The first maxim in equity jurisprudence is that "There is no right without a remedy."

I believe I am correct in saying that the whole of the legislation by way of general laws on the subject, in Ohio, has been since 1864.

If plaintiff's contention is correct, we must assume then that for the first sixty years of our existence, we had no law applicable to the subject and that there is yet no law by which personal property may pass to the consolidated body.

That is hardly likely. In fact, our courts on several reported occasions, have recognized the common law rule, or equitable principle. In the case of *Price v. M. E. Church*, 4 Ohio, 515, decided in 1831, we find the following as syllabus:

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"5. The right to pews in a church, it seems, is limited and usufructuary and does not interfere with the right to pull down and rebuild the church, and if one, not a member of the society, purchases a pew and occupies it for thirty years, he still has but a qualified property in it, subject to the common control."

"6. The property of a religious society is subject to the control of a majority of its members. But in such case the majority must act in good faith and not wantonly."

Judge Wright, in delivering the opinion for the Supreme Court, says:

"Property of this kind, acquired by the common contribution of the members of an association, is subject to their common control. No separate interest is acquired and such property is managed by the majority. Even a vote to divide gives to individuals no right to enforce any separate interest. *Denton v. Jackson*, 2 Johns. Ch., 329."

Then again in 1834, we have the case of *Keyser et al v. Stanisfer et al*, 6 Ohio, 363. Section 1 of the syllabus is as follows:

"Where a religious society purchases land, the title vests in them in fee as a corporation, and the majority of the society, if the charter does not otherwise provide, has the right to control its use and occupation at their pleasure, and no supposed error of opinion or doctrine will authorize the interference of a court of equity to deprive them of such rights."

The same principle is again announced in *Wiswell v. First Congregational Church*, 14 O. S., 31, at page 43:

"That the corporation, with the consent and approval of a majority of the members, may sell the property, is not doubted. This is incident to every corporation, unless expressly restrained, and by this charter is clearly and distinctly allowed."

See, also, *Brundage v. Deardorf*, 92 Fed., 214.

How then shall we construe General Code 10008? Is it an innovation by the General Assembly on a totally unexplored

field, or is it rather a creature arising from the exigencies of an occasion when its necessity became apparent to the legislative mind, to meet the requirements of extreme cases?

“No statute enters a field which was before entirely unoccupied. It either affirms, modifies or repeals some portion of the previously existing law. * * * Whether the statute affirms the rule of the common law on the same point or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law. The general rule in the exposition of all acts of parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; and therefore, in all general matters the law presumes the act did not intend to make any alteration, for, if the parliament had had that design, they would have expressed it in the act.” Black on Interpretation of Laws, Section 95, p. 233.

Applying these principles to the above statute, it is apparent that Section 10008 was never intended to supersede the common law remedy and that decisions above cited correctly lay down the law of today.

Of course no one would contend that a corporation would have the right at any time to divert the property from the object and purpose of the grant or donation.

But that is not this case. Here the plaintiff, a corporation by a vote of more than two-thirds of its members present at the meeting, took the initiative and voted to consolidate. That each of the members of the First U. P. Church had the right to vote on this proposition, I have no question.

Section 15 of the Book of Government and Worship provides:

“All who profess faith in Christ and obedience to His laws

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and ordinances are members of the visible church, and are entitled to *all its rights and privileges.*"

Then Section 6854, General Code, provides that after a religious society has become incorporated, any person who is, or who becomes, a member of that church or society shall be a member of the corporation with the right to vote at all of its meetings for the election of officers or *for any other purpose.*

Neither do I find any inhibition either in the rules of the government of the church or in the statutes against the right of the members to vote on this subject by proxy.

The plaintiff, by a vote of its members (173 for and 81 against) thus decided upon consolidation.

Then what was the next step? A proportionate number of the Second Church also agreed to the union, on condition that a basis of union could be agreed upon. A committee from both churches reported a basis of union. This basis of union was considered and adopted by each congregation. By Section 3, the name of the United Church is provided for, to-wit, "The United Presbyterian Church of New Concord." Section 5 provides "That all property, real and personal, of the two churches shall become the property of the new church." Section 6, "That a church building, having capacity, convenience, and equipment for the use and growth of the new organization, shall be erected as soon as conditions will admit." Section 7, "That the new building shall be erected on the First Church lot."

All these matters involving property rights that are now complained of by plaintiff were taken up, considered, and favorably acted upon by its members. The records of the Second Church show that each section was considered separately and adopted unanimously.

And then *by a unanimous vote* of the congregation, they adopted a resolution to the effect that their session be instructed to join the session of the First Church in a petition to the Presbytery for the union of the two churches.

Then the sessions of the two churches joined in a petition to the Presbytery, asking that the churches be united on the basis as reported.

The Presbytery approved the movement and appointed a commission of five members of its body "to consider and determine proper action to carry out the plan of the union."

This commission met April 3, 1918, at Cambridge and their time was taken up in hearing protests against the union. They adjourned and met again April 6, at New Concord, where both sides were heard and considered. A third meeting was held at Mt. Perry, April 9, when the commission made its report to the Presbytery, uniting the two churches, "upon the suggested basis submitted by said congregations."

This action was "examined and approved by Synod at Erskine, Michigan, September 25, 1918."

This briefly is the history of this case.

Complaint was made that some eight or ten members from these two churches all of whom were favorable to the union sat as members of the Presbytery when the complaints were heard by that body. But there is nothing in the record to show that the commission appointed to act on this matter was packed or prejudiced in any way and of its eight members not one of the number was connected with either of the two churches and none dissented from the report in favor of the union.

This report briefly reviews the condition of the churches, their immediate needs by way of accommodations for the membership, and concludes with the resolution that they "be and are hereby united as one church and congregation * * * said union to be upon the suggested basis submitted by said congregations."

I can not see where there was any manifest abuse of power exercised by either the Presbytery or the Commission. No obligation was imposed by either that had not already been assumed by the two congregations before the matter of union ever reached the Presbytery. No property rights of either were invaded. All these matters were acted upon and determined by

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the congregations before the Presbytery had assumed jurisdiction, and the action of the latter body amounted to nothing more nor less than simply a confirmation and ratification of plaintiff's own acts. Whether or not this court has jurisdiction in this matter until plaintiff has first exhausted its remedy in the church judicatories, I find that none of the charges enumerated in the protest which was lodged with the Presbytery, vital to the issues, has been sustained by the evidence.

In the face of the above facts and authorities, should the plaintiff be heard to complain?

If the rule is correctly stated in *Price v. Church*, *supra*, "That the property of a religious society is subject to the control of a majority of its members"; if the principle announced in *Keyser v. Stansifer*, that "Where a religious society purchases land, the title vests in them in fee as a corporation and the majority of the society, if the charter does not otherwise provide, has the right to control its use and occupation at their pleasure," approved in *Wiswell v. First Congregational Church* above cited, is the law of this state today, as I believe it is, then the plaintiff has made its own bed and must lie in it; and this must be true in the absence of fraud in procuring the union, even though a respectable number of the minority enter a protest.

If the rule were that the decision of the members of the two churches must be unanimous, it would amount practically to a bar against all proposed unions, for, no matter how meritorious the case might be, in every congregation there would probably be found at least one person opposed to the proposition, if for no other reason than that he was constitutionally opposed to that which every other member favored.

"Where public policy or the positive law of the land is not contravened, the decisions and order of such (religious) society, when made in conformity to its policy, should have the same effect in civil courts which the society intended should be awarded to them when pronounced by its own judicatories." *Harrison v. Hoyle*, 24 O. S., 254.

While testimony is before the court to show that a protest was

made by a minority in the Second Church, before the Session and the Presbytery, that body is not in court and, for all intent and purpose of this suit, is satisfied with the union at this time or at the time this action was brought, and the opposition of such minority to this union, as it there existed, should not be taken into consideration by the court further than is necessary to ascertain the action of that congregation at the time on the question of consolidation.

Even though it be claimed that inasmuch as a two-thirds vote is required for the union of two corporations of like faith and discipline, under 10004, such as we have here, and consequently, that that rule, or at least one equally as decisive, must obtain in order to bind the plaintiff rather than that upheld by the foregoing decisions, yet, should the plaintiff, after having voted for consolidation and having met the requirements of 10004, now be permitted to say in effect, "true, more than two-thirds of our membership voted for the union, but the other congregation had no right to vote under that law, no matter what other rights to consolidate they may have had; consequently we will take refuge behind their unauthorized act and seek relief from the effect of our own act and conduct even though the congregation at fault is not here complaining? I hardly think so.

Again, should it take a greater number of its members to consolidate with an unincorporated body than is required for voluntary dissolution, where a vote of only a *majority* of the members present is required? General Code 8739.

Counsel for plaintiff place much reliance upon the case of *Presbyterian Society v. Markley*, 10 N.P.(N.S.), 529. I regard this opinion by Judge Hoffheimer as a very able exposition of the law on the subject and some of the facts in that case were quite similar to this; but the pivotal facts are different. The whole of Judge Hoffheimer's opinion is evolved from the consideration of a few vital points. There was a written agreement between the First and Second Presbyterian Churches of Cincinnati (both corporations) for consolidation according to the requirements of the Presbyterian form of government *and*

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the statutes of Ohio. The court held that by virtue of the statutes such agreement and plan were invalid and inoperative unless approved by a two-thirds majority of the members of each church, as the statutes required. The Presbyterian form of government provided that a request for consolidation by the churches should precede its action in consolidating. Such request had not been made. The Presbytery also undertook to add a third, the General Presbyterian Church, to the union, and "It thus appears as a matter of fact, the agreement to merge was never consummated because the requirements of the statutes were not met, and it also appears as a fact that the people who composed the First Congregation never requested an ecclesiastical union with the Central and Second Presbyterian Churches." (p. 541.)

Judge Hoffheimer asks a very pertinent question in that case: "How could secular trustees of a corporation created under the law of a state * * * be merged out of corporate office by a purely ecclesiastical decree, or by force of it?" Under the facts of that case, the First Church never having made the necessary "request" for the union and the members of the First Church never having requested a union with the Central and Second Churches, that could not be done. But in the case at bar, with more than two-thirds of the congregation present at a meeting regularly called for the purpose, voting in favor of the union and which must necessarily have meant the final surrender of its charter, could not the plaintiff have so decided even before a formal surrender of the charter to the state had been made under General Code 8738 *et seq.*, which requires but a majority of those present at the meeting voting in favor of the surrender?

As stated earlier in this opinion, the Presbytery has not, by its decree, robbed plaintiff of any of its corporate rights.

It has not legislated plaintiff's trustees out of office, nor has it so decreed; neither has it interfered with its property rights. All these rights were in effect, voluntarily surrendered to the union by its own deliberate acts.

Those acts do not involve the question of sale or incumbrance of church property which is usually perfected through an order of the common pleas court. Nor is there in the act of consolidation, a diversion of the property from the object and purpose of the original grant; but rather, in furtherance of it.

All the Presbytery did was simply to grant plaintiff's petition along with that of the Second Church, praying for the consolidation of the two bodies.

Having taken these steps, with all the proceedings regular, and with no charge of fraud, the plaintiff should be required to abide the results.

It is exceedingly unfortunate that this litigation has arisen between these two congregations of the same village and of the same faith. No doubt, it has already engendered bitterness among some of the members that will linger in the memories of future generations; and the finger of the scoffer of that locality will point to it as a monument to religious strife, and it is plain that it will not be conducive to the building up of the great cause of the Master.

If there would be anything that could be done to remove this feeling consistent with the principles of law and justice, the court would gladly tender its services; but it is feared that the mischief has already been done, and we must rest content with a decision of the questions involved.

The decree will be for the defendants and the temporary restraining order dissolved. Judgment accordingly. Appeal bond, \$250.

NOTE: This case was taken on appeal to the Court of Appeals and on April 29, 1919, the following decision and entry were made: "Judgment for defendants. Petition of plaintiff dismissed and injunction dissolved."

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CONDITIONS OF AUCTION SALES.

Common Pleas Court of Hamilton County.

G. G. RICHARDSON v. W. F. KENNEDY ET AL.

Decided, January Term, 1919.

Sales—Terms and Conditions which Bind the Seller—When the Sale is by Auction—Buyer without Remedy against Mistake in Catalogue, When—Cattle Bought under the Impression They had been Subjected to the Tuberculin Test.

At an auction sale each purchaser is bound to ascertain at his peril the terms and conditions as announced at the beginning of the sale, and one depending upon a previous announcement by catalogue or an agent, which differs from the one made at the sale, is without remedy.

Carl Lehman, counsel for plaintiff, in support of motion for instructed verdict, cited and commented upon the following authorities:

Hadley et al v. Clinton County Importing Co., 13 O. S., 505; *Eisenhauer v. Brosman*, 44 La. Ann., 742; *Satterfield v. Smith*, 33 N. S., 60; *Ashcom v. Smith*, 2 Penrose & Watts, 211,* 218; *Morrison v. Morrison*, Watson S., 516; *Vauleer v. Fain*, 6 Humphreys, 104; *Kennell v. Boyer*, 122 N. W. (Iowa), 941.

Cunningham & Acomb, for defendant.

The plaintiff held an auction sale of registered jersey cattle, and a printed catalogue was prepared by the auctioneer and circulated by mail which contained terms and conditions of sale, one of which was "tuberculin test chart furnished with each animal sold." This term was inserted in the catalogue by mistake, the cattle not having been tuberculin tested and the plaintiff having no tuberculin test charts. Plaintiff did not know of this mistake until the day preceding the sale. Under her instructions

the auctioneer, in making the public announcement of the terms and conditions of the sale immediately prior to its commencement, called the attention of the prospective bidders to this error and announced that the cattle would be sold under the following tuberculin test term:

“Buyers desiring tuberculin-test may have same at their expense. Any re-acting animals will be retained on the farm, and cost of test paid by the seller. All animals to be tested before leaving the farm.”

Several days before the sale the defendant, W. F. Kennedy had received from the auctioneer one of the original catalogues which contained the erroneous tuberculin test term. He was not present at the time the sale commenced nor did he hear the announcement of the error in, and the change of, the tuberculin test term. He purchased two cattle and gave plaintiff a note signed by himself and his wife, defendant Mrs. W. F. Kennedy, for the purchase price, which is the note sued upon in this case.

No tuberculin test was requested by the defendant nor was one made before the cattle were removed from the farm. Subsequently a test was made by the state, and it was found that the cattle were tubercular at the time of the sale. There is no suggestion of fraud, and the fact that the cattle were tubercular was unknown to all parties. The defendants claimed that they were not liable upon the note, and also by way of cross-petition the defendant W. F. Kennedy asked for damages on the ground of the breach of an express warranty, arising from the original tuberculin test term, that the cattle were free from tuberculosis.

Plaintiff moved the court to instruct the jury to bring in a verdict for the plaintiff for the full amount claimed in her petition.

The motion was granted and Judge Geoghegan instructed the jury as follows:

“*Gentlemen of the Jury:* The evidence has been closed and the plaintiff has made a motion for peremptory instruction in

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her favor, and the court grants that motion and it is only fair to let you know why.

"At all auction sales persons are bound to apprise themselves of any terms and conditions of the sale made at the time set for the sale. You will observe, this case is based on what we lawyers call or term as express warranty, that these heifers were free from tuberculosis, and that a tuberculin test chart would be furnished to each buyer. The undisputed evidence is that there was a mistake as to this on the part of the auctioneer who prepared the catalog, and that before commencing the sale it was announced that the charts would not be furnished because the test had not been made, but that if anybody desired a chart, it would be furnished after the test had been made.

"The defendant does not dispute this, but he says he did not hear it.

"At auction sales persons are bound at their peril to hear the terms of sale as announced, because circumstances and conditions often change between the time of the printing of the catalog and the time of sale; so all persons are bound to hear the terms of sale at their own peril. There may be typographical errors or some things may be stated by agents which are not true in fact, and it would only be fair to the persons attending the sale that the truth be told them. So, as a matter of convenience, all persons must apprise themselves of the conditions and must be present when the auctioneer cries the sale to so apprise themselves. If that were not the case, Mrs. Richardson would have had to go through with that sale leaving all persons believing that the cattle had been tested, which was not true, or else after each bid the auctioneer would have had to announce to any person who might be there that the statement in the catalog was not in accordance with the facts. For instance, as to these two heifers, if Mr. Kennedy came along after somebody had bid \$100, and he had rushed in and said—"I bid \$125," well before the auctioneer accepted he would have had to say—"Why, Mr. Kennedy, we changed this condition as to the tuberculin test chart." So the law has to adopt the most expedient way and make it obligatory for all persons to be there, at the time fixed for the crying of the sale at their peril, in order to know of changed conditions. Any of you who have attended sales know that such changes are made.

"If Mr. Kennedy was not bound to hear, then he is entitled to recover, because Mrs. Richardson and her attorney do not dis-

pute the fact that these cattle were to be free from tuberculosis according to the catalog.

"As there is no dispute in the matter as to its being stated that the cattle had not been given the tubercular test, if defendant were bound to hear, then it was binding upon him, and it is no excuse for him to say he was not there at the time the auctioneer announced the mistake in the catalog.

"So, therefore, it will be your duty to return a verdict for \$125 and interest, or \$143.75."

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In an action for an accounting, only those items can be allowed which are supported by proper evidence. 393.

ACTIONS—

Proper procedure by creditors holding claims which were incurred by receivers in excess of their authority. 1.

Against government controlled railways may be maintained where involving the companies themselves, but should be brought against the Director General where involving their status as common carriers. 356.

Determination as to the cause of; suit for money on a contract of employment; counter-claim, based on acts of a tortious character, subject to demurrer; joinder of inconsistent claims; subject of action distinguished from cause of action. 409.

The right to sue for a tort is lost by entering into an agreement for reparation. 423.

ADVERSE POSSESSION—

By the city of land acquired for canal purposes but always used as a street. 273.

AGENCY—

A real estate agent can not recover a commission for finding a purchaser for property which the owner was not able to transfer. 266.

AID OF EXECUTION—

In a proceeding under a judgment against a constituent company, which has been purchased by a united company and paid for by stock issued to individuals, the stock so issued held to be subject to payment of said judgment; circumstances under which the property of the united company becomes liable. 537.

ALIENS—

Non-resident enemy aliens are without standing in the courts during the continuance of war; alien enemies and alien friends distinguished; trading with the enemy act. 257.

War disqualifies an alien enemy to file an action during its continuance, and postpones further proceedings in a pending action until the return of peace. 257.

AMENDMENT—

A claim set up for the first time by the filing of an amended petition does not date back to the filing of the original petition, and where the statute has run against the claim so set up, the effort to enforce the claim by introducing it into an amended petition is as nugatory as though it were made the basis of a new suit. 483.

APPEAL—

Under the workmen's compensation act an appeal is taken in time if filed within thirty days after denial of a rehearing. 11.

Does not lie to the common pleas court from action of the

county commissioners in the matter of a tax refunder. 30.

APPROPRIATION—

See EMINENT DOMAIN.

The statutory provision that the defendant land owners costs, expenses and attorney's fees must be borne by the railway company in the event the appropriation proceeding is abandoned has reference to cases in which the abandonment has been voluntary on the part of the company. 518.

Where dismissal of the proceeding was secured, as shown by the finding of the court, because of the desire of the company to obtain more land from the defendant than was described in the petition, a purpose is manifest to abandon the case without prejudice, and the character of such a dismissal is not changed by failure of the company to take the benefit of an amended petition. 518.

ASSESSMENTS—

For street improvements levied on the benefit plan; presumption that the assessment was correctly levied arises, when; discretion in the adoption of a plan not open to review; benefit and front foot plan of assessment can not be commingled. 13.

ATTACHMENT—

Credits of a non-resident debtor payable generally may be garnished in this state by serving process on his debtor residing within the jurisdiction of the court and without personal service on him (the non-resident debtor). 473.

A non-resident creditor may bring an action in such a case and garnishee a debtor of the non-resident defendant debtor. 473.

ATTORNEY AND CLIENT—

A cause of action for legal services can not be joined against an individual and also against the same defendant as administrator, nor can either of such actions be joined against a corporation, where the said causes do not affect all the parties to the action

and are triable to different tribunals. 117.

Compensation for services rendered by an attorney to a public trust must be moderate in amount—even more moderate than if performed for a private concern; elements to be considered in fixing compensation in such a case. 441.

Construction of contract for services of attorney; interpretation of the contract from the conduct of the parties; value of the services of an attorney in appropriating property found to be worth in the aggregate more than one million dollars; fixing the value of services rendered on behalf of a trust. 441.

AUCTION—

Terms and conditions which bind the seller at an auction sale; buyer without remedy against a mistake in catalogue, when. 589.

AUTOMOBILE—

Responsibility for striking machine ahead where several machines were following each other closely. 514.

BANKRUPTCY—

A trustee can not recover by replevin in a state court property of a bankrupt held under a chattel mortgage, when; elements which must be shown to render a mortgage invalid; the four months period runs from adjudication; jurisdiction where property claimed to belong to the bankrupt is involved. 282.

BANKS AND BANKING—

The capital stock of a bank is improperly assessed for taxation when the assessment is based on market value. 361.

The corporate franchise or good will of a bank can not be regarded as property for purpose of taxation. 361.

BOUNDARY—

Determination of, where one side and the radius of a circular strip is known. 58.

CAMP-MEETING—

Validity of assessment against owners of lots on the meeting grounds. 21.

CANALS—

Title to land acquired for canal purposes but which has always been used as a street. 273.

CHAMPERTY AND MAINTENANCE—

Agreement with beneficiaries for non-resistance to a will contest, with compensation for losses sustained, does not violate the doctrine of champerty and maintenance. 65.

CHARGE OF COURT—

In an action by a pedestrian for injuries from being struck by an automobile at a street crossing. 49.

With reference to the nature of a contract of sale. 221.

An error in the charge to the jury, which resulted in a reduction of the amount of damages recovered by the plaintiff, may be corrected by overruling motion for a new trial on condition that the defendant consent to an increase in the amount of the verdict equal to the amount of the plaintiff's claim covered by the error, the presumption being that he could have proved the full amount had he been permitted so to do. 418.

CHURCHES—

See RELIGIOUS SOCIETIES.

CIVIL SERVICE—

Classification and protection of employees a legislative function; perfection of an appeal by one who has been removed; prescribed steps must be followed; constitutionality of the act; courts without jurisdiction, unless. 187.

CONDEMNATION—

As to liability of the plaintiff railway company for costs incurred by defendant land owners where the proceedings are abandoned, see APPROPRIATION.

CONSTITUTIONAL LAW—

The Moore-Barnes act, Section 486-31, is a valid enactment. 187.

One who has suffered an injury can not be compelled to accept a substitute party defendant. 505.

CONTRACTS—

With beneficiaries under a will for non-resistance to an action to set the will aside not in violation of the doctrine of champerty and maintenance where relief is sought against the provisions of a trust and also the furtherance of the interests of all parties to the will. 65.

Are ordinarily interpreted with reference to custom and usage; but custom and usage can not establish what would constitute a reasonable time within which to carry out a contract which has been stopped by unforseen and impossible conditions. 233.

In the absence of an express contract to pay therefor, a claim for services rendered by one member of a family to another member thereof can not be sustained; *inter vivos* gift in such a case held to be invalid. 393.

Interpretation of a contract from the conduct of the parties. 441.

CONVEYANCE—

For railway purposes only, otherwise to revert; action in ejectment after intermediate conveyances. 58.

CORPORATIONS—

An assessment levied by the trustees of a camp-meeting association against cottage and lot owners for the purpose of maintaining the grounds, light and water systems, etc., and not for profit, is not *ultra vires* or in violation of the discipline of the Methodist Episcopal church, and an action lies for recovery of such an assessment. 21.

An interurban road which is being run at a loss may be abandoned so far as the charter granted to the company by the state is concerned, but the company may be

compelled to abide by its franchise agreements. 81.

The personal liability which attaches to trustees of corporations not for profit applies to debts incurred during their incumbency. 193.

The procuring of judgment and issuing of execution against a corporation not for profit does not bar an action against the trustees on their individual liability. 193.

The issue to individuals of stock in payment for a constituent company does not place said stock beyond reach in a proceeding in aid of execution under a judgment against the constituent company. 537.

COUNTER-CLAIM—

A defendant is at liberty to set up a counter-claim only when it is based on an affinity of right which will afford the same harmony between the subject of the action and the counter-claim that is found between causes which may be properly joined. 409.

COUNTY—

Limitation on the time for action with reference to allowances for clerk hire; procedure where the amount allowed is found to be inadequate. 241.

Transfers from the officers' fee fund to the general fund. 241.

A contract for improvement of an inter-county highway is not rendered void through failure of the auditor to file a certificate as to the necessary funds being available, where the funds were as a matter of fact available and the auditor did file a certificate within five days of the passage of the appropriating resolution. 249.

Where there is a moral, although not a legal, obligation on the part of a county to pay for a public improvement, a court will not interfere with such payment by injunction in the absence of any relief being offered thereby to the tax-payers represented by the relator. 249.

The statutory requirement as to the filing of the auditor's certificate is directory and not mandatory. 249.

COUNTY COMMISSIONERS—

Have no authority to review the action of taxing officials. 30.

COURTS—

The jurisdiction of the Superior Court of Cincinnati over corporations is restricted to those which are located in Cincinnati or have their principal office or place of business in said city. 127.

CRIMINAL LAW—

Prosecution of a parent for not permitting his child to engage in patriotic exercises in the public schools. 121.

Prosecution for the unlawful sale of intoxicating liquor not open to attack because of failure to locate the premises where the sale was made. 270.

Prosecution does not lie for having in possession a fish net, when. 323.

Conversion of street railway fares by a conductor does not constitute embezzlement, when. 437.

Prosecution for assisting in placing wagers on horse races. 468.

CUSTOM AND USAGE—

While evidence as to custom and usage is inadmissible to vary the obvious meaning of words used in a written instrument, it is competent for the purpose of explaining the meaning of the instrument as a whole. 223.

The usages of a particular line of trade are valid, and contracts made in that line will be deemed to have been made with reference to them, when. 223.

But custom and usage can not establish what would constitute a reasonable time within which to carry out a contract, the further execution of which has been stopped by unusual and impossible conditions. 223.

Shipments of grain in accordance with a contract rendered impossible by a railway embargo and harmful weather conditions constitute a condition under which custom and usage can not continue the obligation; construction to be placed on the phrase "reasonable time." 233.

sion of the husband may be allowed out of his real property, or out of tangible personal property, or if he has neither real nor personal property but is dependent on his earning power, the wife may be given a decree for money to be paid in gross or in installments out of the proceeds of his business, trade or occupation. 324.

DAMAGES—

Compensatory damages for injuries, not willfully inflicted, which have resulted in hopeless insanity with no periods of lucidity which would permit the victim to appreciate or enjoy the fact of ownership and control of money and its purchasing power, should be in an amount sufficient to provide the victim with the necessities of life together with such luxuries as she is still able to enjoy, but should not include any award for pain, suffering or mental anguish, or for causing the insanity as such. 418.

Compensation for injuries may include expenses voluntarily provided for by another in advance of suit. 418.

DEBTOR AND CREDITOR—

Conflicting views as to whether the situs of a debt is the domicile of the debtor or the creditor. 473.

An Ohio court has jurisdiction in a suit in attachment against a debt owing to a non-resident. 473.

DEED—

Unless a deed conveying land for school purposes for the consideration of one cent contains a forfeiture clause, the title does not revert to the original grantor or his heirs upon abandonment of use of the land for school purposes. 225.

DISCRETION—

In the matter of striking a pleading from the files as a sham. 530.

DIVORCE AND ALIMONY—

Alimony based on the aggres-

EMBEZZLEMENT—

Where the rules of a street railway company provide that no conductor shall deposit a fare for a passenger in a fare box, a prosecution for embezzlement does not lie against a conductor who is accused of receiving fares which he did not deposit in the box but appropriated to his own use. 437.

EMINENT DOMAIN—

Authority to a railway company to exercise the right of incorporation sufficiently shown, when. 97.

Failure to agree with the owner as to the value of the land is shown by evidence of an offer by the railway company and its rejection by the owner. 97.

ERROR—

In charge of court corrected by defendant consenting to an increase in the amount of damages awarded on condition that a new trial should not be granted. 41b.

Where counsel "excepts" to the course of argument to the jury pursued by his opponent, but does not in terms "object" thereto, and upon being questioned by the court stated that he did not desire a ruling on his exception, the error to which the exception was directed, if any there be, is not saved, and it is too late on motion for a new trial after an adverse verdict to ask for a ruling on the exception. 489.

"Exceptions" and "objections" distinguished. 489.

EVIDENCE—

Failure of, to show cause of injury is sufficient ground for direct-

ing a verdict for the defendant. 33.

The report made in regular course by a receiving physician of a public hospital is a public document and admissible in evidence. 125.

Exceptions to the hearsay rule. 125.

The rule that circumstantial evidence can not prevail against that which is direct and positive is applicable only where there is no doubt of the truth of the direct and positive evidence. 351.

The question of the truth of direct and positive evidence is for the jury, and a verdict will not be set aside for the reason that the jury rejected such evidence and based their verdict on circumstantial evidence, no passion or prejudice being manifest in their finding. 351.

An incompetent and immaterial answer, which has been ruled out, is not rendered competent by making it a part of the answer to a subsequent question, when. 489.

EXECUTION—

Property levied upon claimed by a third person; determination of title; three-fourths jury law not applicable; justice of the peace may be compelled to enter judgment in such a case. 113.

EXEMPTION—

Of widow without dependents. 263.

FENCES—

Enforcement of the statute requiring the trimming of a hedge fence along a public highway; discretion of public officials with respect thereto; the fact that the damage accruing might exceed the jurisdiction of a justice of the peace not a bar to an action before a justice, but judgment could not be asked for more than \$300. 196.

FISH—

Possession of a fish net may be explained, and where it is evident no intention existed to use it in

an unlawful manner prosecution does not lie. 323.

GAMBLING—

A police officer may lawfully arrest, without warrant, a person whom he finds violating an ordinance against having in possession writings commonly used as memoranda of wagers on horse races. 468.

Where the accused is in his place of business and has slips lying before him and upon recognizing his caller as an officer attempts to conceal them, his arrest without a warrant is legal. 468.

The seizing of such papers under such or similar circumstances is not in violation of the constitutional right of the accused to protection against search and seizure. 468.

Penalty not recoverable for separate losses; premature suit by wife for recovery of money lost by her husband; property owners brought in after the statute had run as to them. 483.

GIFTS—

Where claimed to have been made *inter vivos* by a relative in consideration of care and support. 393.

GUARDIAN AND WARD—

Expenses voluntarily paid by a guardian, arising out of personal injuries sustained by his ward, may be recovered in an action brought on account of such injuries. 481.

HABEAS CORPUS—

Does not lie for release of a prisoner committed on a defective mittimus. 184.

HEIRS—

Omitted from a partition case may enter appearance and file answer without the formality of summons. 329.

HOMESTEAD—

Waiver by executory contract of

the right of homestead exemption is against public policy and can not be enforced. 7.

Widow entitled to exemption in personality notwithstanding she does not have the care, maintenance or custody of a minor child or children. 263.

HUSBAND AND WIFE—

Money given by a wife to her husband during the period from 1867 to 1872 under circumstances indicating an intention to create the relation of debtor and creditor, is recoverable by her on her estate under the legislation of that period. 521.

INFANT—

An infant can not verify a pleading. 534.

INJUNCTION—

Does not lie to prevent payment for an improvement for which the county is morally, though not legally, liable, where the relief sought would not benefit the tax-payers whom relator represents. 249.

Does not lie against prosecution criminally of a sanitary ordinance, admittedly valid, where the penalty involved a fine but there is no interference with property rights and no irreparable injury is involved; but where the effect would be in the nature of prohibition or irreparable damage is involved equity will intervene. 406.

INSANITY—

Causing insanity is not a ground for damages beyond charges for proper maintenance of the one suffering therefrom. 418.

INSURANCE (Fire)—

A provision in a policy of fire insurance, limiting the time for bringing suit to one year after a fire, is binding on the insured. 286.

The incapacity of the insured does not militate against such a provision, where it appears that a guardian was appointed immediately after the fire, who filed

proofs of loss but upon rejection of the claim neglected to file suit until one year from the date of his appointment. 286.

INSURANCE INDEMNITY—

When a company issuing a policy of indemnity against liability for personal injuries makes itself liable to pay a judgment before actual payment thereof by the insured. 537.

INSURANCE (Life)—

Where the policy gives the proceeds to the wife of the insured and after her death to their children, the word "children" can not be construed to include "grandchildren," where the death of the beneficiary precedes that of the insured. 200.

INTEREST—

On money given by a wife to her husband fifty years ago under circumstances indicating an intention to create the relation of debtor and creditor. 521.

INTERURBAN ROADS—

See STREET RAILWAYS.

INTOXICATING LIQUOR—

An affidavit charging the unlawful sale of intoxicating liquor is not rendered insufficient through failure to locate the premises. 270.

JUDGMENT—

The Ohio rule which denies to a trial judge authority to grant a motion for judgment *non obstante veredicto* unless based on the pleadings, works hardship and entails useless labor and expense where a case is found to be without merit after it has been given to the jury. 37.

JURISDICTION—

Of the Superior Court of Cincinnati over corporations is restricted to such only as are located in Cincinnati or have their principal office or place of business in said city. 127.

Personal service in Cincinnati upon the president or managing agent of a corporation, not located in said city or having its principal office or place of business therein, does not confer jurisdiction. 127.

Where property claimed to belong to a bankrupt is involved. 282.

In action involving railways which are controlled by the government. 356.

Where property sought to be attached is owned by a non-resident. 473.

Order of Director of Railways as to venue in conflict with the provisions of the Ohio General Code. 553.

Where the ownership of corporate stock standing in the name of an insane husband was claimed by his wife. 161.

JURY—

The three-fourths jury law is not applicable to an action before a justice of the peace involving the right of property. 113.

JUSTICE OF THE PEACE—

Mandamus is the appropriate remedy to compel a justice of the peace to render judgment upon a verdict returned before him. 113.

LANDLORD AND TENANT—

The recovery of judgment for rent due up to the filing of the suit is not a bar to an action for subsequent installments accruing during the remainder of the term of the lease. 203.

Neither does the fact that a receiver was appointed in the first action and remained in control of the property during the remainder of the lease affect the liability of the lessees for rents accruing during the receivership; nor can recovery be limited to the amount in the hands of the receiver. 203.

LAND REGISTRATION—

Refused upon petition of abutting owners seeking to perfect title to land acquired for canal

purposes but always used as a street. 293.

LEGISLATIVE POWER—

Delegation of, in the attempt to fix venue in railway cases. 553.

LIBEL AND SLANDER—

Use of defamatory words against a number or class of persons not the basis of an action for slander where brought by the group as a whole; but any single member of the group may recover if he can satisfy the jury that he was the one against whom the words were directed. 562.

As to whether there was publication where the language was uttered of and concerning three persons and was heard by no person except the three. 562.

As to the use of language which was abusive but was clearly not intended to impute crime. 562.

LICENSE—

A license for the use of motor vehicles on the streets of a municipality is void if the amount is made so high as to amount to a tax rather than a mere regulatory provision. 107.

LIENS—

Classes of employees entitled to preference not different under Section 8339 from Section 11138; automobile salesmen not entitled to preference. 177.

MANDAMUS—

Is the appropriate remedy for compelling a justice of the peace to enter judgment on a verdict returned before him. 113.

MILEAGE—

Witnesses living at a distance from the place of holding court are entitled to mileage only once in the same case; but where there is an adjournment of the hearing for a longer period than over night, as from Friday to Monday or some later day, it is within the discretion of the court to make a second allowance of mileage. 158.

MISJOINDER—

Of parties defendant in an action by an employee for injuries. 157.

MOTOR VEHICLES—

The provision of Section 12603, regulating the operation of motor vehicles, does not permit a jury to adopt a standard of care and duty under the influence of caprice or a temporary whim, but merely embodies in statutory form the common law rule of reasonable and ordinary care in view of all the circumstances of the time and place. 49.

Pedestrian struck at a crossing by an automobile; charge of court. 49.

MUNICIPAL CORPORATIONS—

The sale of an interurban road for junk may be enjoined by a municipality which is a party to a franchise agreement which has not yet expired. 81.

A municipality has power to regulate and license motor vehicles used on its streets for hire, but the license is incident to the right to regulate, and the fee charged must be reasonable and proportionate to the expense incurred in issuing the license. 107.

An ordinance which provides for a fee of one dollar for licensing a motor vehicle and an additional charge of \$25 to be used in repairing the streets is not regulatory, but a tax, and the provision for its collection is void. 107.

The duties of a workhouse guard are in the nature of those of a policeman, and where employed by the month he is not entitled to overtime when employed more than eight hours a day. 155.

A workhouse guard while at work for the public is not employed on public work within the meaning of Section 221-1 of the ordinance of Cincinnati. 155.

Council is the sole judge of the necessity of a sidewalk improvement. 175.

A contract for a street improvement is not rendered invalid by

reason of the fact that, because of increases in prices, the contract is for a larger amount than the engineer's estimate, where no statute limits the actual cost to the estimated cost. 209.

Where a municipality erects and operates an electric light plant for the purpose of furnishing its inhabitants with light, heat and power, inhabitants who enter into contracts with the municipality for such service acquire no rights thereby and such contracts can not be enforced. 289.

The plant in such a case may be sold by the municipality for a valuable consideration; acquiescence in the use of the streets by the purchaser for such purpose will be presumed, and denial of such consent is estopped, when. 289.

But an ordinance which grants to such a purchaser consent to occupy the streets and also authorizing a sale of the electric plant contains two subjects and is for that reason void, and provisions for charges for service, extensions and additions are not binding upon either of the parties. 289.

Contracts which inure for the benefit of the inhabitants of a municipality by virtue of a franchise granted to a public utility corporation are subject to and superseded by the public utilities act, unless the power to grant such rights is conferred by valid constitutional statutes in express and unmistakable terms. 289.

A policeman's tenure is rendered valid by creation of the office, fixing of the salary, appointment by the mayor and confirmation of the appointment by council; must be an elector of the municipality he serves and his standing is that of a public officer. 340.

Prosecution for violation of a sanitary ordinance can not be interfered with by injunction, unless. 406.

NEGLIGENCE—

Liability of an employer for negligence in furnishing his em-

ployees contaminated drinking water from which one of them died of typhoid fever. 17.

In case of an injury received on a defective sidewalk, the city and the negligent contractor are not tort feorsors, and their concurrent acts of negligence, the one of omission and the other of commission, do not permit of their being joined either with or without the abutter in the same action. 26.

Settlement by a negligent contractor for injury received on a defective sidewalk does not bar an action against the city on account of the same accident. 26.

Where there is a failure to produce any evidence tending to show negligence on the part of the defendant, the court is justified in granting a directed verdict for the defendant. 33.

The doctrine of *res ipsa loquitur* is not applicable where the injury complained of was not the probable consequence nor one reasonably to be anticipated from the cause assigned. 37.

A finding is necessary that plaintiff's negligence contributed as a proximate cause of his injury before a non-suit can be granted. 49.

Requirement as to the degree of care which should be exercised by a chauffeur; the enactment of Section 12603 merely embodies in statutory form the common law rule of reasonable and ordinary care in view of all the circumstances of the time and place. 49.

One who leaves percussion caps of a highly explosive nature in a place where children of tender years are likely to resort is liable for injuries to a child who takes the caps and causes them to explode. 351.

Where one suffering from a negligent act enters into an agreement for reparation, he loses his right to sue for tort. 423.

Where an alighting street car passenger was thrown into the street and injured by a lurch of the car. 439.

One who has suffered injuries on a federal controlled railway can not be compelled to accept the Director General of Railways as a substitute defendant, but he may be made a party to the case. 505.

As to negligence in the operation of an automobile in collision with a machine just ahead; cause of the accident determined by surrounding circumstances. 514.

Misjoinder of parties defendant in an action for. 157.

NON-SUIT—

Must be based in an action for injuries upon a finding that plaintiff's negligence contributed as a proximate cause of his injury. 49.

OFFICE AND OFFICER—

A policeman is a public officer and must be a resident and elector of the municipality which he serves. 340.

PARTIES—

To an action to determine rights growing out of a trust created by a will. 71.

In an action for legal services it is not competent to join an individual and the same person in his capacity as administrator. 117.

One who is aggrieved can not be compelled to accept a substitute party defendant. 505.

PARTITION—

Summons is not necessary in the case of heirs who were not made parties, where the property was properly described and the heirs so omitted have voluntarily entered their appearance and filed answer and have made no cross-demands. 329.

Heirs of the blood are not estopped by quit-claim deeds from claiming by descent. 329.

PHYSICIAN AND SURGEON—

Where a patient after describing her symptoms consents to an operation which would require an ab-

dominal incision, she is presumed to authorize such operation as her condition is found to require, and if during the operation a second incision is found necessary authority to make it is implied. 206.

PLEADING—

Misjoinder of parties defendant, where the causes arise on different rights and are triable in different tribunals. 117.

General and specific denials are alone authorized by the Code; a denial of each and every allegation not admitted or denied is without authority. 345.

The rule requiring that facts be stated without repetition applies to both parties, and forbids repetition of facts stated in the petition by allegations of admission in the answer. 345.

The use of ordinary language in pleading means that the facts should be stated in concise and condensed form. 345.

Where in an action by a fraternal beneficiary association against one of its collectors and the surety on his bond, for the recovery of money on a contract of employment, he is charged with acts of fraud, dishonestly and misappropriation of funds in the amount sued for, the contract is the transaction giving rise to the cause of action; and the subjects of the action are the acts constituting the violation of plaintiff's legal rights under the contract. 409.

A counter-claim, in such action, filed by the defendant collector, for damages caused by the plaintiff's circulation of printed matter charging him with embezzlement of the same money referred to in the petition, is based upon a different transaction, tortious in nature, and is not connected with the subject of the action, essentially, but not casually only. Such counter-claim is therefore demurrable. 409.

The subject of an action or subject-matter of an action is embodied in the acts or facts alleged

to have been violated of a legal right, and the defendant is at liberty to set up a counter-claim only when it is based on an affinity of right which will afford the same harmony between the subject of the action and the counter-claim that is found between causes which may be properly joined. 409.

Slovenly pleading throws unnecessary labor on the court. 345.

In rebutting a presumption of law the bringing upon the record of some new fact is preferable to an equivocal denial.

In an action on a note in the short form the plaintiff is presumed to be an innocent holder; demurrer does not lie to the defense that part of the note is usurious. 390.

Subject of an action distinguished from the cause of action. 409.

The nature of an action can not be changed and an invalid proceeding given validity by the filing of an amended petition; the only course open in such a case is the dismissal of the action and filing of a new petition. 483.

A claim set up for the first time in an amended petition does not date back to the filing of the original petition, and where the statute has run against the claim so asserted the effort to make it a part of the original petition is rendered nugatory by the fact that rights are involved which have been determined. 483.

An answer and cross-petition will not be stricken from the files as a sham when a material allegation contained therein is not denied by the plaintiff. 530.

POLICEMAN—

Is a public officer; necessary steps to make his appointment valid. 340.

PREFERENCES—

Of employees of an insolvent—see **LIENS**.

PRESUMPTION—

In an action brought on a note in the short form the presumption

is raised that the plaintiff is an innocent holder, and demurrer does not lie to the defense that the note was usurious. 390.

PROMISSORY NOTES—

The plaintiff is presumed to be the innocent holder of a note on which an action has been brought in the short form. 390. •

PUBLIC CONTRACTS—

Where no statute limits the actual cost of an improvement to the estimated cost, the fact that the contract is awarded for an amount in excess of the engineer's estimate does not render it invalid where the increase may be accounted for by rising prices. 209.

PUBLIC UTILITIES—

A drastic provision of the public utilities act permits an electric lighting company to advance its rates regardless of existing contracts with its customers; courts unable to give relief. 266.

Controlling effect of the act upon stipulations contained in a franchise ordinance; an agreement between a utility and a municipality may be contractual in form, but is not immune from legislation; different method of procedure may be prescribed for the utility by the Legislature without impairment in the constitutional sense of an existing contract with the municipality. 289.

RAILWAYS—

See PUBLIC UTILITIES.

The privilege granted to a traction company to cross a steam road on its own private right-of-way is a sufficient consideration for an agreement by the traction company to maintain the crossing. 76.

Before beginning appropriation proceedings foreign companies must show necessity for acquiring the land and authority for making the appropriation. 97.

Rule embodied in a freight tariff construed in accordance with the

plain meaning of the words, although the purpose of the carrier in framing the rule was manifestly different. 169.

Actions in tort against government controlled railways; legal status of the companies and of the Director General; actions involving the companies themselves distinguished from those in which they appear in their capacity as common carriers. 356.

Order making the Director General of Railways defendant in actions against railways under federal control not applicable to cases involving torts. 505.

But under the provisions of Section 11255, G. C., authorizing further parties defendant, the Director General upon his own application and without objection by plaintiff or the defendant railway company may remain a party defendant in an action for personal injuries suffered on a railway under his control. 505.

A railway company is not liable for costs and attorneys' fees of defendant land owners in an abandoned appropriation proceeding unless the abandonment was voluntary. 518.

The order of the Director General of Railways limiting venue conflicts with the jurisdiction of the state courts as fixed by the Ohio General Code, and is a delegation of legislative power. 553.

REAL ESTATE AGENT—

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A bequest to a named trustee to be applied to whatever object he may designate constitutes a valid trust if the named trustee is living at the time it is proposed to make the application of the fund; but the discretion confided in the trustee makes his indispensable to its validity, and no charitable trust is created independent of the named trustee. 130.

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